112-273

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~1050.~~ ~~6096~~ ~~7088~~ 96

WELLINGTON GODDIN, EXECUTOR OF S. P. VIAL, DECEASED, PLAINTIFF IN ERROR,

vs.

THE MUTUAL ASSURANCE SOCIETY OF VIRGINIA.

IN ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA.

FILED OCTOBER 14, 1881.

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1 VIRGINIA:

Pleas before the supreme court of appeals of Virginia, held at the State court-house in the city of Richmond, on Thursday, November 25th, 1880.

Be it remembered that heretofore, to wit, on the 3rd day of July, 1879, came Wellington Goddin, executor of Seymour P. Vial, dec'd, by counsel, and filed his petition praying for an appeal from a decree pronounced by the chancery court of the city of Richmond in a case in which the petitioner was plaintiff and the Mutual Assurance Society of Virginia against Fire on Buildings was defendant, which petition, with a transcript of the record accompanying the same, is in the words and figures following, to wit:

1½ *Petition.*

VIAL'S EX'OR
v.
MUTUAL ASS. SO. OF VA.

To the Hon. Joseph Christian, one of the judges of the supreme court of appeals of Virginia, or any other judge of that honorable court:

The petition of Wellington Goddin, executor of Seymour P. Vial, dec'd, respectfully sheweth that the annexed is a transcript of the record of a case lately depending in the chancery court of Richmond in the name of your petitioner against the Mutual Assurance Society of Virginia against Fire on Buildings, in which a decree was rendered by the chancellor against your petitioner and his bill dismissed.

Your petitioner feels much aggrieved by said decree, and he is advised that the same is erroneous, and therefore he prays that an appeal may be allowed him from the same, and that the same may be reversed.

In the years 1856, 1858, and 1859 the testator of your orator had several buildings in the city of Richmond which belonged to him insured by the defendants against fire, by policies duly executed, and which are filed in the cause.

The defendants filed an answer to the said bill, in which they did not deny the fact of insurance, but denied all liability on their part—

1st. Because the plaintiff's buildings were destroyed by fire which was caused by the burning of certain tobacco warehouses which were burnt by order of the Confederate Government as a war measure.

2 2ndly. That the plaintiff is estopped from all right to recover by the 4th section of the 11th article of the constitution and by-laws of the said company.

3rdly. By resolution of the standing committee of the society which was adopted the 31st July, 1865.

4thly. Because the plaintiff did not give notice to the defendants of the fire (which occurred on the 3d day of April, 1865).

Your petitioner begs leave to refer to his printed statement of the case, herewith filed, as a part of this petition.

The chancellor also stated the facts in his opinion (at page 115 of the record); that all the facts in the case have been agreed, and the paper containing the agreement filed in the cause. (See page 70 of the record.)

The defendants seem not to have been willing to place their defence

upon any one ground, but rolled it over among several, as for instance—

1st. I am not liable at all;

2ndly. If I was liable, you are estopped from asserting your claim and my liability; and

3rdly. Because if you are not estopped you waived your claim.

In the same spirit the chancellor seems to have taken up and decides that the claim of the plaintiff is not good, because the fire resulted from the invasion of "a foreign enemy."

The 12th section of the rules of the company, upon which they rely, being in the following words:

"SEC. 12. No policy whatever which may be issued shall bind the society to answer for losses which may result from riots, civil commotions or insurrections, from the invasion of a foreign enemy, from hurricanes or earthquakes, or from the direct or indirect agency of the proprietor of the building which may be burnt."

And then, he says, if it was not this, then it was that, to wit, an invading force, which was engaged in putting down an insurrection. And then he seems to delight himself very much with the idea that if there had been no fire there would have been no burning, and therefore the wind must be considered part of the fire, which he regards as an un'swerable syllogistic sequitur. But I beg leave to reply, as the first Chief Justice Chase did to Mr. George Hay, at the Federal court bar, "a clear non sequitur, sir."

The Supreme Court of the United States took a very different view in the case of Milwaukee and St. Paul Railway vs. Kellogg, 4th Otto, page 469.

The court will find that case fully commented upon at the 3rd and 4th pages of the printed portion of my petition in this case, and I will not, therefore, repeat it here, but content myself with simply stating the points established by that case. Dealing in no fine-spun theories, nor in syllogistic sequiturs founded upon no facts, the learned court says:

3 1st. "The rule is that what is the proximate cause of an injury is ordinarily a question for the jury," to be determined as a fact in view of the circumstances of fact attending it.

2ndly. "The primary cause may be the proximate cause if there was an unbroken connection between the wrongful act and the injury, such as the strength and direction of the wind, the combustible character of the elevator (which was set on fire), its great height, and the proximity and combustible nature of the saw-mill and the piles of lumber."

3rdly. "The enquiry must therefore always be whether there was any intermediate cause disconnected from the primary fault and self-operating which produced the injury."

What are the admitted facts as ascertained by the evidence in this case? They are, 1st, that the utmost care and caution were used by the officers charged with setting fire to the warehouse in order to prevent the fire from extending to any other building; that there was, therefore, no negligence on the part of the government or its agents; that the firing of the warehouse was a deliberate act, and not a negligent one, performed not with the intent to fire any other building, but with the opposite intent, and that when the fire was communicated to the warehouse the morning was still and calm. The warehouse was near the bank of the James River, on the south of Canal street, with Canal street, Cary street, and Main street, and Tenth street, and Eleventh street between the fired warehouse and the buildings of Mr. Vial

which were burnt, and numerous houses, most of which were built of brick, and the whole, together with the streets, occupying the space of 1,550 feet, in direct space between the fired building and the buildings of Mr. Vial. Now, the simple questions upon this evidence are those propounded by the Supreme Court in its opinion just quoted; that is, 1st. "Was there an unbroken connection between the wrongful act and the injury complained of; a continuous operation? 2nd. Did the facts constitute a continuous succession of events so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and injury? 3rd. To jusstify the conclusion or opinion that the firing of the warehouse was the proximate cause of the fire which destroyed" Mr. Vial's buildings, it must appear (says the court) that the injury (fire) was the natural and probable consequence of the negligence or wrongful act (the firing of the warehouse), and that it ought to have been foreseen in the light of the attending circumstances.

It also appears that the wind afterwards rose and carried the fire to a great distance, and burnt Mr. Vial's houses. It is clear, then, that the defendants were just as liable to the plaintiff as if the fired tobacco warehouses had been in Manchester, and by a strong wind the coals had been carried to the free bridge, or Mayo's bridge, or the railroad bridge, or to all three, and thence to Richmond, and the plaintiff's houses had been burnt.

4 If in this view of the facts of the case I am right, then the liability of the defendants is consummate, no matter who ordered the tobacco to be burnt. But let us see if the chancellor is right in his roving argument, and inconsistent conclusions of a foreign enemy and an insurrection.

In the first place, it is a settled rule of construction that words are to be taken in their strongest sense against the party who proposes them and claims the benefit of them; and, again, that all words are to be construed with reference and regard to the circumstances under which they are used.

The policies of insurance were executed in the years 1856, '58, and 1859. What was then meant by the term foreign enemy? Who was in the mind of the contracting parties? Was he an *an* American, or was he not an alien enemy as much as if he had been so called in totidem verbis? The war of 1812 with England had passed, and so had the war of 1847 with Mexico. To interpret this contract, therefore, as being applicable to the late civil war, is to insert the power not merely to construe, but to alter and strike out a part of it in violation of a fundamental maxim of the law that no written contract shall be changed or altered, and the contract read, not merely as if the word foreign was not in it, but the word domestic was. What man would ever come before a court or judge to enforce a written contract if he was told beforehand that the court was not bound merely to construe and enforce, but might alter and abolish as it pleased—might do that to and with the contract which if either party to it had done before it was brought into court, he would have been found guilty of forgery. What matters it, then, whether the honorable supreme court of Virginia thought the government of the Confederate States was a government de jure or de bello? Those two questions are totally unlike, as the words indicate, and all jurists acknowledge. De facto simply means one is a government in fact, and not a rebellious mob, having no organized government in fact. De jure means a government of right, lawfully constituted, and exercising its authority, and, taking either,

takes with it no right to alter or abolish a written contract, which the law says shall be construed, not altered, as it was written, giving to each word in it its proper force and meaning. To violate this rule in any case would be to upturn the law and make the judges not the things we now almost worship because they are honest and impartial, as well as able and fearless, but make them creatures and partizans.

In ordinary cases that would be bad enough, too bad to be borne, but worse, much worse, would it be in this case for both parties to the policies of insurance to put a different interpretation upon them from that which the honorable chancellor does. The war lasted for four years, and while it was in progress plaintiff and defendant lived here at the seat of government, and the defendant, never pretending to what he now fraudulently insists upon, received from the plaintiff for three years at least the premium of insurance (added to much more that he had previously received) without ever intimating that he did not consider the policy as protecting the insured against the very danger which was staring him in the face. Shall any interpolation be strained even, or words added to or taken from the contract in order to protect such a fraud. But the honorable chancellor, when he finds that his fiery Pegasus of war does not carry him into the ranks of foreign enemies, falls back upon the insurrectionary movement. But there again his Pegasus limps. The war was neither foreign nor insurrectionary. It was a civil war. Wheaton's Law of Nations is clear and conclusive. At page 523 he says: "A civil war is when a party arises in a state which no longer obeys the sovereign, and is sufficiently strong to make head against him, or when in a republic the nation is divided into two opposite factions, and both sides take up arms."

Again he says, at page 524:

"When a faction is formed in a state which takes up arms against the sovereign in order to wrest from him the supreme power, or impose conditions on him, or when a republic is divided into two parties which mutually treat each other as enemies, this war is called civil war, which means war between fellow-citizens. Civil wars frequently commence by popular tumults which in nowise concern foreign nations."

Thus showing that the term rebel is not known in a military controversy in a republic anywhere but the United States, and that the parties to it cannot properly be called "foreigners," our chancellor to the contrary notwithstanding.

In respect to the Insurance Co. vs. Tweed, 7 Wall., 44 (which the judge refers to page 52), I have only to say that the case does not touch the case at bar, and if it does, is directly in my favor, and that the policy of insurance expressly provided amongst other things "against any military or usurped power or explosion;" and the loss in that case was caused by an explosion caused by a battle, in which one of the parties was what they call usurped military power. The policy was made in 1864, and the language which has been just quoted shows that it was the purpose of the insurer to guard against liability for Confederate mischief.

In respect to the case of the Insurance Company vs. Boone, which is quoted in the argument of Mr. Lyons in Mr. Græme's case, which is herewith filed, the circuit court judge decided it in my favor. But the 8 to 7 court reversed him, contrary to the opinions of Justices Clifford, Miller, and Field.

The firing of the tobacco is relied upon as an act of war by the Confederate Government, but I submit that it was not in any just sense.

The act of congress, under which it is said the firing was done,
6 authorized Gen'l Lee to fire tobacco and other stores when, in his opinion, it should be necessary to prevent the enemy from obtaining them. That act of congress was passed flagrante bello. Gen'l Lee was not in Richmond, and did not come to Richmond, but authorized his subaltern to execute the law when, in his opinion, it should be necessary to do so for the purpose expressed in the act; thus substituting the discretion and judgment of the subaltern for that of the commander-in-chief, which, under the act of congress, he had no right to do, and therefore the act of the subaltern is to be regarded as unauthorized; and what he did was done most indiscreetly, although to the best of his ability, for he fired the tobacco after the Confederate Government had abandoned Richmond. The war was ended, and Richmond had capitulated, and by the laws of war private property was not subject to capture, and its destruction by Gen'l Lee's subaltern was simply a violation of private right. The enemy's troops entered Richmond with the consent of the city, and they were the most efficient agents in extinguishing the fire, but there was no riot and no mob.

W. GODDIN,
Ex'or of Seymour P. Vial, Dec'd.

We are respectfully of opinion that the decree complained of in the foregoing petition ought to be reviewed.

JAMES LYONS,
W. W. GORDON,
Counsel Practising in the Court of Appeals.

RICHMOND, VA., *July 2d*, 1879.

Appeal allowed and supersedeas awarded. The petitioner being a personal representative, no bond is required.

JOS. CHRISTIAN.

JULY 3RD, 1879.

To the clerk of the supreme court of appeals at Richmond.

7 TRANSCRIPT OF RECORD.

VIRGINIA:

In the chancery court of the city of Richmond.

Among the records and proceedings in this court are the following, viz:

W. GODDIN, EXECUTOR OF S. P. VIAL, DEC'D, pl'tiff,
against
MUTUAL ASSURANCE SOCIETY OF VIRGINIA, def't.

Bill.

To the Hon. Edward H. Fitzhugh, judge of the chancery court of Richmond:

Complainant showeth unto the court that your orator, Wellington Goddin, executor of Seymour P. Vial, deceased, that his testator, in his

lifetime, insured in the Mutual Assurance Society of Virginia three tenements in the city of Richmond, as follows: A lot on Main street, between 12th and 13th, for $9,200.00, by policy No. 17940; a lot on Bank street, between 9th and 10th, for $16,160.00, by policy No. 2229; and a lot on Main street, between 9th and 10th, for $4,000.00, by policy No. 20795; that these tenements were all destroyed by fire accidentally, and without any agency of your orator, on the 3d day of April, 1865; that the premium of insurance on the said policies were all punctually paid to the said society by the said Seymour P. Vial, in his lifetime, and by your orator after his death, up to the time of the destruction of the said tenements by the said fire; that the policies of insurance were, with other papers of your orator's, destroyed at the same time that the said tenements were destroyed; that since the said fire your orator has applied to the said Mutual Assurance Society to pay the said insurance, but it has declined to do so, on the ground that the fire was of such a character that under the 12th section of the 10th article of the constitution or charter of the said society, the said society is not liable for the said insurance; that by the said objection and refusal the said society waived any right which it might have had to require of your orator a compliance with any other article or regulation of the said society, but that had it not done so it would not have been practicable for your orator to make any other demand than that which he has made, because, at the time of the said fire, and for some time afterwards, there was no court or magistrate in the city of Richmond before whom your orator could have appeared, for the purpose of making any affidavit or complaint in respect to the said fire.

8 Your orator avers, however, that the loss was a total one, from which there was no salvage, and the said society is justly liable to pay to him the amount of the insurance as aforesaid; that, in consequence of the destruction by fire as aforesaid of the said policies of insurance, your orator is advised that his proper remedy is in the court of chancery.

In tender consideration of all which, he prays that the said Mutual Assurance Society may be made defendant to this bill, and may be required to answer the same; that it may be compelled to produce the duplicates which it has, of the said policies of insurance, and to pay to your orator the sums of money before mentioned, with interest thereupon according to law, and such other relief as to equity shall seem meet.

May it please, &c.

LYONS,
J. HOWARD, *P. Q.*

Amended bill.

To the Hon. Edward H. Fitzhugh, judge of the chancery court of the city of Richmond:

Wellington Goddin, executor of Seymour P. Vial, deceased, respectfully states that he has heretofore filed in this honorable court an original bill against the Mutual Assurance Society against Fire on Buildings of the State of Virginia, sometimes styling itself and commonly known as the Mutual Assurance Society of Virginia, to recover certain losses sustained by his testator's estate, by reason of the destruction by fire on the 3d day of April, 1865, of certain buildings insured in said society, and the property of said estate.

By way of amendment and supplement to the said bill, and more

specifically and fully to set forth the grounds of said complaint and the remedy required in the premises, your complainant, with leave of the court first had and obtained, now alleges and states—

That his said testator departed this life in 1861, leaving a will, which was duly admitted to probate in the hustings court of the Richmond, in which your complainant was named as executor, and upon which he duly qualified as such.

That in his lifetime the said S. P. Vail, insured in the said society against such losses as should happen by fire or lightning, three tenements in the city of Richmond, situate as follows: a tenement on Main street, between 12th and 13th street, for $9,200.00, by policy No. 17940; a tenement on Bank, between 9th and 10th streets, for $16,120, by policy No. 22990; and a tenement on Main, between 9th and 10th streets, for $4,000.00, by policy No. 20795—the total amount of insurance upon the said buildings being thus the sum of $29,320.00.

9 That according to the constitution, rules, and regulations of the said society and its course of business and practice at the time of the effecting of said policies (as your complainant is informed), when a person insured in said society, it was valued by two competent disinterested appraisers under the superintendence of a special agent of the society, and a declaration or application for insurance was filed by the applicant setting forth the character, dimensions, and locality of the buildings, together with a certificate of such valuation signed by such appraisers, and a certificate of such special agent that the appraisers had made oath before him that such valuation had been made according to their best skill and judgment; that of the value so verified four-fifths and no more could be insured in said society, and that if the declaration was accepted a policy was issued to the applicant stating on its face a description of the building, the amount of such valuation, and the actual amount of insurance, or actual sum insured, for which the society covenanted and agreed to be bound.

That sometimes, and indeed very often, the policies, though duly executed, and the insurance continued in existence for years, were never taken from the office of said society, but remained there in custody for the insured.

That a part of the premium was required to be paid upon the effecting of the insurance, and annual quota assessed, according to the exigencies of the society, during the continuance of the insurance, which was in its nature perpetual, and a lien on the property insured was reserved for the securing payment of said quota and all assessments made by said society.

That said three policies above specified were effected by the said Seymour Vial in accordance with the said constitution, rules, and regulations, and the custom and course of business of said society.

That while said policies were in full force, to wit, on the 3d day of April, 1865, the said three tenements, the property of the estate of said S. P. Vial, were, without any fault or default of your complainant, totally destroyed by fire.

That all of the provisions of the said policies have been complied with and none of their prohibitions violated. Nevertheless the said defendant has refused to pay said insurance money or any part thereof, and pretends that it is exempt from all liability to pay the same, because the said fire, as it alleges, was caused by "an act of war," and soon after the said fire by which said buildings and also a large part of the said city of Richmond were destroyed said defendant, by a resolution or resolutions of its standing committee, which is its governing

board of directors, and by the declarations of its officers and agents, denied, on that ground, and caused it to be publicly known that
10 it denied all liability on its part for any losses caused by said fire, and has continued on that ground to deny its liability and to refuse to pay any losses caused by said fire.

And now, as your complainant is informed, said defendant, after having all along from the first publicly and persistently denied all liability to pay such losses, on the alleged ground of such exemption, has of late further pretended that it is not liable to pay such loss because, as it avers, notice of said fire was not given to it and proof of such loss was not furnished to it at the time.

But your complainant is advised and insists that said several pretences are mere illegal and invalid excuses for not paying the just and full amount of said insurance money; for he is advised and insists that by no act of war, if said fire was caused by an act of war (which is not admitted, but denied), was said defendant exempted from paying said money, according to the construction of said policies, or of its said constitution, rules, and regulations, and that there is nothing either in said policies or in said constitution, rules, and regulations which offers any ground for said alleged exemption.

And your complainant is further advised and insists that by said open and avowed general denial of all liability as aforesaid, upon the ground of said alleged exemption, said defendant waived any and all notice of said fire and proof of claim, and that it does not now lie in its mouth to say that such notice and proof was not given.

In point of fact such notice and proof under the circumstances would, even in the absence of said denial of liability have been wholly useless and supererogatory.

The object of such notice is to give the insurer an opportunity of enquiring into the good faith of the insured in the transaction, and the object of proof of claim is to give the insurer an opportunity of enquiry into the extent of the loss. From causes with which it was well known to the defendant your complainant had nothing to do, on the morning of the said 3d day of April, 1865, nearly one-third of the said city of Richmond was totally destroyed by fire. The destruction of said buildings belonging to your complainant's testator's estate, situate as they were on two of the most frequented and populous business thoroughfares of the city, and indeed in its very heart, was as well known to the officers and agents of the defendant as it was to your complainant, and the destruction was sweeping, total, and complete.

Formal notice of the fire and the loss would have been in any event a mere formal act of supererogation under the circumstances, and in view of the general denial of liability aforesaid it would have been doubly idle and futile, and your complainant is advised that the law requires no man to do an idle and futile thing.

11 In reality, however, soon after the fire, your complainant did what was totally unnecessary—made personal application to the late Col. John Rutherfoord, then the principal agent and executive officer of the defendant, to know if such losses would be paid by the defendant, when the prompt reply was given in accordance with the said general denial of liability which had been publicly made known and avowed, that said defendant would not pay any such losses, because said fire was "an act of war."

In said original bill it is briefly stated that said policies above-mentioned were destroyed by the said fire; a great many of your complainant's own papers were destroyed by that fire, and it is highly

probable that, if said policies were ever taken from the office of the defendant. Affidavit of the loss or destruction of said policies is hereto appended.

In tender consideration whereof, your complainant prays that said Mutual Assurance Society against Fire on Buildings of the State of Virginia may be made a party defendant to this amended and supplemental bill, and be required to answer the same, as well as the said original bill: that discovery may be made of such applications or declarations for insurancing together with the said certificates thereto annexed, as are set forth and described in this bill, and that the same may be produced; that copies of said several policies may be produced, if the original cannot be produced; that a copy of said constitution, rules, and regulations may be produced; that discovery may be made of said resolution or resolutions denying liability for losses caused by said fire as aforesaid, and particularly of a resolution under date of about the 18th day of May, 1865, and of a resolution of or about the 18th day of July, 1865, as well as any other or others, or any action of said defendant recorded in the minutes of its official proceedings or otherwise touching its said denial of liability for such losses, and that copies of the same be produced; that the said sum of $29,320.00 may be decreed to be paid to your complainant, with interest thereon from the said 3d day of April, 1865, until paid; that all proper process may issue, and all proper orders and decrees may be made; and all such other further and general relief may be granted to your complainant as the nature of his case may require, and to equity may seem meet.

And he will ever pray, &c.

JAMES LYONS,
JOHN HOWARD, *P. Q.*

Answer of defendant.

The answer of the Mutual Assurance Society against Fire on Buildings, of the State of Virginia, to the bill of Wellington Goddin, executor of Seymour P. Vial, deceased, filed in said court,
12 and to the amended and supplemental bill filed by the said Goddin, as said executor, against this respondent as defendant.

This respondent for the purpose of introduction, and as preliminary to a detailed and specific answer to the allegations of said bills, original and amended, begs leave to state that it is (as the bill imports) an incorporation under the laws of Virginia. Its original charter was enacted December 22nd, 1794, by an act of the general assembly entitled "An act for establishing a Mutual Assurance Society Against Fire on Buildings in this State," which charter has been amended by divers acts of the general assembly from time to time, which will be cited or noticed hereinafter, and will fully and at large appear in the printed pamphlet containing the constitution, rules, and regulations of the society, and filed as a part of this answer by this respondent, and marked "A," and prayed to be taken as part of this answer. It will be seen that by the terms of the original charter, passed by the act of December 22nd, 1794, and in this particular now remaining unaltered and unchanged, that the society was created to insure "against losses and damages occasioned accidentally by fire." In conformity to this *principal* and rule the society has specifically and expressly excluded liability for losses which may result from certain enumerated causes or occasions, which will be more fully and particularly noticed in this answer hereafter. Under the said charter, the constitution, rules, and regulations of this

mutual association, this respondent wholly and utterly denies liability for the alleged losses and damages of the complainant's testator, or of the complainant in said bills, original and amended.

Further answering, this respondent admits that, subject to the constitution, rules, and regulations aforesaid, this respondent society did, on the 19th day of February, 1856, by policy No. 17940, insure the said Seymour P. Vial (per his declaration No. 17940) on property therein described, to the amount of $9,200.00 against loss by fire or lightning, according to the true intent and meaning of the said acts of the legislature of Virginia, and the said constitution, rules, and regulations of the said society, as will more fully and at large appear by reference to the said declaration and policy herewith filed, and prayed to be taken as part hereof, marked respectively Nos. 1 and 2; and on the 31st day of December, 1859, on like terms and conditions by policy No. 20229, did insure the said Vial (per his declaration No. 20229) on property therein described to the amount of $16,160 against loss by fire or lightning as in the said first-mentioned policy, as will appear by reference to declaration and policy herewith filed as part hereof, marked respect-
13 ively, No. 3 and 4; and on the 19th day of January, 1859, on like terms and conditions, by policy No. 20795, did also insure the said Vial (per his declaration No. 20795), on property therein described, to the amount of $4,000, against fire or lightning, as in the first-mentioned policy, as will appear by reference to the declaration and policy herewith filed as part hereof, marked, respectively, No. 5 and 6.

Further answering, this respondent shows that, according to the constitution, rules, and regulations of said society (hereafter designated, for convenience, C., R., & R.), it was not responsible or liable for certain losses by fire, which were expressly provided against and excepted from all insurance by the same. On page 16 of the C., R., & R., chapter 10, § 12, it is provided: "No policy whatever which shall be issued shall bind the society to answer for losses which may result from riots, civil commotions, or insurrections, from the invasion of a foreign enemy, from hurricanes or earthquakes, or from the direct or indirect agency of the proprietor of the building which may be burnt."

This respondent avers and insists that the loss or destruction sustained by the complainant's testator, whatever may have been its extent, upon the property set out in the said bill or bills, imposes no obligation on this respondent society.

1. It was not occasioned accidentally by fire, and so was not within the chartered or within the contracted liabilities of the society. (Sec. 11, page 16, C., R., & R.)

2. Said loss or damage was excluded and excepted from the liability of said society for the same by section 12 of chapter 10, above cited.

It was the result of one or more of the occasions specified therein, namely, riots, civil commotions, insurrections, or foreign invasions, &c., &c. During and pending the existence of the said policies, violence, civil commotion, war, or invasion existed, or one or more of them existed between the United States and the Confederate States, which continued nearly four years. Towards the close of that struggle the property in the bills mentioned (covered by said policies) was fired and destroyed by the Confederate States authorities as a war measure, and in pursuance of their policy, declared and adopted in case of foreign invasion, under the following circumstances: The city of Richmond, the situs of the property aforesaid, was the capital of the Confederate States, and had been occupied by its government for nearly four years. Large supplies of munitions of war and army stores of every kind had been collected

and stored by said government in the said city, in depositories held and occupied by the said goverment. It had taken possession of all the tobacco in said city, and had stored the same in certain warehouses,
14 which were held under its control and subject to military supervision; and it had, with a view to the burning of said tobacco, placed and distributed throughout the same, in said warehouses, a large quantity of combustible materials, to facilitate and expedite the burning of the same on the 3rd day of April, 1865, in consequence of imminent and impending danger of the capture of the city of Richmond by the forces of the United States; and in pursuance of the laws and policy of the Confederate States Government to destroy military stores and tobacco which were liable to capture by the forces of the United States, the said depositories containing said stores, and the said depositories containing the said tobacco, were set fire to and burned by the military authorities of the Confederate States; and the said fires so kindled, some of them in the very heart of the city and adjacent to the property aforesaid in the bills mentioned, spread over the city, and in their course burned, consumed, and destroyed the said property. This firing was done just as the Confederate authorities evacuated and abandoned the city of Richmond, and before the city was taken possession of by the forces of the United States. This was all done without the knowledge, consent, or concurrence of this respondent. It was done by the Confederate authorities because of a foreign invasion which led the said authorities to enact and declare that tobacco, cotton, and military stores should be destroyed when it was in danger of falling into the hands of the enemy. At the same time and from the same cause many other buildings, as described in the complainant's bill, were destroyed, and nearly all the business portion of the city laid in ruins.

This respondant society had, together with other insurance companies, millions of dollars of insurance upon the property thus destroyed. No one of those whose property was thus destroyed ever preferred a claim for the loss until years had elapsed.

This respondent did not consider itself in any wise liable upon its policies for such losses, and in that opinion there was a universal acquiescence until this and another claim were preferred, more than five years after the alleged loss had occurred. The complainant was cognizant of the action of respondent in denying all liability for *m*uch losses as are now claimed by the complainant. He knew, or should have known, of the resolutions adopted by respondent, denying all liability for such losses—the resolutions called for by complainant, copies of which are herewith filed as part hereof, marked, respectively, 7, 8, and 9. It was known to complainant that this society was bound, in conformity to its charter and the C., R., & R's, only to protect against "accidental fires," and that it denied responsibility for losses resulting from war or the consequences of war; and in this the complainant and others in like circumstances acquiesced for many years. Had he not acquiesced, it was
15 his duty to give notice, timely and sufficient, of his intention to prosecute his claim by complying with the requirements of the C., R., & R's of the society, giving immediate notice, and enabling the society to protect itself according to law and justice. Instead of this there was no demand and no complaint through all these years.

In the mean time the society has changed in a large degree its constituent members. A large number of those who were members in 1865, and who were equally responsible under the mutual feature of the society with the rest, were allowed to withdraw and others have since taken their place, so that the body corporate has changed in large

measure. In this change large property and many persons are or may be involved, but to what extent or in what manner or proportion, are serious questions, if they shall arise, which this respondent, under advice, cannot now state or anticipate.

This respondent, further answering, says that it denies all liability for the losses claimed in complainant's bill, original and amended, because by the terms of the contract arising under the declarations and policies in this case, respondent was not bound to make good the said losses; that under the circumstances and according to the facts attending the destruction of said property this respondent was exempt from liability by reason of the express terms of the contract, and especially by reason of the exception against fire which may result from foreign invasion, civil commotion, or insurrection; and farther, that if these exemptions did not relieve respondent from liability, the acquiescence of the complainant, as above stated, would be an estoppel to a recovery; and further, also, that the action of the legitimate authorities of the society in denying liability and compensation in such cases would bar all recovery.

This respondent requires the production of the complainant's alleged authority as executor of Seymour P. Vial, and a copy of his will, to the end that it may appear whether complainant has authority to make the demand asserted in this suit, on authority which respondent do' not admit.

Further answering, this respondent shows that after the destruction of the property insured by the aforesaid policies, Nos. 17940, 20229, and 20795, and after the respondent's denial of responsibility therefor was well known to complainant and others, the said complainant recognized and admitted the validity of the said denial of liability, and received and accepted a pecuniary benefit from respondent, founded upon such denial, which respondent would not have allowed or said complainant have received but for such admission, and thereby the said complainant became and is equitably estopped from asserting the claims in his said bills. This estoppel will be more readily understood by the following facts which respondent presents: By article 11th, section 4, of the C., R., & R., it was provided that when an insured building
16 should be removed or taken down and another one erected in its place, the new building might be insured, upon valuation, and the premium paid on the former building be allowed as a credit against the premium on the new building. (See page 17 of pamphlet.) By resolution of the society dated 31st July, 1865 (of which Exhibit No. 9 is a copy), the said section four of article XI was intended and applied to insured buildings destroyed during the war under circumstances exonerating the society from liability for loss With a knowledge of all these facts and circumstances, and especially that said credit for past premiums was allowed by the society in consideration of the non-liability of the society on the losses under the prior policies, the said complainant did cause and procure this society to insure new buildings erected upon the premises mentioned in said policies, No. 20229 and 20795, and did in such insurance of new buildings obtain and secure credit for the former premiums, well knowing that this society would not insure said new buildings on such terms except upon the admission of its non-liability for such losses. Accordingly, this society, with the knowledge and procurement of the complainant, did, on the 19th day of February, 1867, by policy of that date, insure to Henry Exall, lessee of the complainant, buildings therein described, erected upon premises mentioned in said policy No. 20229 as A and B,

valued at $5,440.00 at a premium of $90.00, and allowed as a credit thereon $81.60 for prior premiums, under the resolution aforesaid of 31' July, 1865, and the denial of respondent's liability as aforesaid, and did, on the 30th August, 1867, by policy of that date, insure to John Lucas & Co., lessees of the complainant's buildings therein described, erected upon premises mentioned in said policy No. 20229 as C & D, valued at 5,440.00 at a premium of $90.00, and allowed a credit thereon of $81.60 for prior premiums under the said resolution of 31st July, 1867, and the denial of respondent's liability as aforesaid; and did, on the 15th day of May, 1867, by policy of that date insure Casper Wendlinger, lessee of the complainant, buildings therein described, erected upon premises mentioned in said policy No. 20795, valued at $4,000.00 at a premium of $137.50, and allowed a credit thereon of $53.50 for prior premiums under the said resolution of 31st July, 1865, and the denial of respondent's liability as aforesaid.

Having answered, respondent prays to be hence dismissed with costs, &c.

In verification of this answer, the said society has hereto affixed its seal, and the principal agent has hereto subscribed his name, this ninth day of March, A. D. 1878.

THE MUTUAL ASSURANCE SOCIETY OF VA.
[SEAL.] By HERBERT A. CLAIBORNE, *Principal Agent.*

17 *Exhibits Nos. 1–2.—Filed with answer.*

No. 17940.

Revaluation of buildings formerly declared for assurance by Seymour P. Vail per declaration No. 15601.

I, the underwritten Seymour P. Vial, residing at Richmond, in the county of Henrico, do hereby declare for assurance in the Mutual Assurance Society against Fire on Buildings of the State of Virginia, my buildings on my lot on the northeast of Main street, between 12 and 13th streets, now occupied by Chas. D. Yale, situated between the property of A. A. Kirchmann on the southeast, and that of James B. Royster and wife on the northwest, in the city of Richmond, and in the county of Henrico, the dimensions, situation, and contiguity to other buildings or wharves; what the walls are built of, and what the buildings are covered with, are specified in the hereunto annexed description of the said buildings, on the plat signed by me and the appraisers, and are valued by them as appears by their certificate hereunder, to wit:

Marked:

The & stove-store & dwelling,	A at	$6,000	say six thousand dollars.
The addition & water-closet..	B at	3,000	three thousand do.
The tin manufactory.....	C at	2,500	twenty-five h'd do.
The.....	D at	.....	do.
The.....	E at	.....	do.
The.....	F at	.....	do.
The	G at	.....	do.
The.....	H at	.....	do.
		$11,500.	

Say eleven thousand five hundred dollars. I do hereby declare and affirm that I hold the above-mentioned buildings, with the land on which they stand, in fee simple, and that they are not nor shall be insured elsewhere, and I and my heirs and assigns will abide by, observe, and adhere to the constitution, rules, and regulations, which are already established, or may hereafter be established by a majority of the insured, present in person, or by representatives, or by a majority of the property insured, represented either by the persons themselves, or their proxy, duly authorized, or their deputy, as established by law, at any general meeting to be held by the said assurance society, or which
18 are or may hereafter be established by the standing committee of the society.

Witness my hand and seal this day of February, 1856.

SEYMOUR P. VIAL. [SEAL.]

Teste:

SAMUEL T. PULLIAM,
Special Agent.

We, the underwritten, being each of us freeholders, declare and affirm that we have examined the above-mentioned buildings of Sey. P. Vial, and we are of opinion that, having regard to their local situation, state of repair, and the present cost of building, they are now actually worth eleven thousand five hundred dollars in ready money, as above specified, to the best of our knowledge and belief.

As witness our hands.

I. A. GODDIN,
R. D. MITCHELL,
Residing in Richmond.

I, the undersigned do hereby certify that I verily believe the buildings herein described are not overvalued.

SAM'L T. PULLIAM,
Special Agent.

(See MS. record for diagram.)

The within-mentioned buildings formerly insured in the name of Seymour P. Vial, per declaration No. 15601.

Marked in the former declaration—	Described in the former declaration as—	Marked within—	Described within as—	Present actual value.
				Dollars.
A	Store & dwelling	A	Tin & stove store	6,000
B	Addition, &c	B	Addition & water-closet	3,000
C	Lumber-house	C	Tin manufactory	2,500
D				
19 E				
F				
G				
H				
Total value				$11,500

Dollars as expressed in the body of the within declaration.

SAM'L T. PULLIAM, *Special Agent.*
I. A. GODDIN,
R. D. MITCHELL, *Appraisers.*

CITY OF RICHMOND, *to wit:*

The within-named Isaac A. Goddin and R. D. Mitchell this day personally appeared before me, the subscriber, a notary public for the city aforesaid, and made oath that the within valuation has been made according to the best of their skill and judgment.

Given under my hand this 19th day of February, 1856.

SAM'L T. PULLIAM.

I, H. A. Claiborne, principal agent of the Mutual Assurance Society Against Fire on Buildings of the State of Virginia, do hereby certify that the above and within constitute a true copy of a declaration of revaluation filed and recorded in the general office of the said society.

In testimony whereof I hereunto subscribe my name as principal agent, and affix the seal of the said society at its office in Richmond, this 3d day of December, 1877.

[SEAL.] H. A. CLAIBORNE.

No. 17940.

This policy of assurance (for the revaluation of the building declared for per former declaration, No. 15601) witnesseth:

That Seymour P. Vial, residing at Richmond, in the county of Henrico, has entered for assurance against loss or damage by fire, in the Mutual Assurance Society Against Fire on Buildings, of the State of Virginia, per his declaration No. 17940, filed and recorded in the general office, the following buildings occupied by Chas. D. Yale, situated on the northeast of Main street, between the property of A. A. Kirschmann on the southeast, and that of James B. Royster and wife on the northeast, in the said town of Richmond and in the county of Henrico, to wit:

20 Building used as—	Marked—	The walls built of—	The roof covered with—	Valued at—	Nett amount insured.		Premium.	
				Dollars.	*Dollars.*	*Cents*	*Dollars.*	*Cents.*
Tin and stove-store and dwelling	A	Brick	Slate	6,000	4,800	00	72	00
Addition and water-closets	B	do	do	3,000	2,400	00	36	00
Tin manufactory	C	do	do	2,500	2,000	00	40	00
					$9,200	00	148	00

21 Which sum of nine thousand two hundred dollars is the real sum insured, and on which there has been paid eighty dollars premium, and now this day sixty-eight dollars additional premium, and he, the said assured, having by the above-mentioned declaration, agreed, for himself and his heirs, executors, administrators, and assigns, to abide by, observe, and adhere to the constitution, rules, and regulations of this society, which are already or may hereafter be established for the said assurance society.

'now all men by these presents, that the aforesaid assurance society shall be subject and liable to pay, agreeably to the acts of the legislature of Virginia, and the constitution, rules, and regulations which are already or may hereafter be established for the said assurance society unto the said assured, or to his heirs, executors, administrators, or

assigns, all such losses or damages as shall happen by fire or lightning after sunset of this day to the above-mentioned buildings, according to the true intent and meaning of the said acts of the legislature of Virginia, and the consitution, rules, and regulations of the said society as aforesaid; provided, that the aforesaid buildings are at this instant in existence, and that if they, or any part thereof are, or hereafter shall be insured elsewhere, this policy shall be void.

In witness whereof, the principal agent of the said society has signed this present policy with the seal of the office annexed (the same having been countersigned by his chief clerk) at the city of Richmond, this 19th day of Teb'y, one thousand eight hundred and fifty-six.

(Signed) J. RUTHERFOORD. [SEAL.]

Countersigned.

(Signed) J. B. DANFORTH, *Chief Clerk.*

Exhibits 3 and 4.—Filed with answer.

No. 20229.

Revaluation of building declared for assurance by Seymour P. Vial, as per declaration No. 16764.

We, the underwitten, Isaac A. Goddin and George D. Shell, special agent and appraisers, do hereby certify that we have viewed and revalued the building heretofore declared for assurance in the Mutual Assurance Society Against Fire on Buildings of the State of Virginia by Seymour P. Vial, as per his declaration for assurance numbered 16764. That the said buildings are at present owned by the said Seymour P. Vial, residing at Richmond, and are occupied by Mrs. Pegram and Mrs. Howard; that they are situated on the south of Bank street between 9th and 10th streets, bounded on the southeast by property lately purchased by Robert H. Maury, and on the northwest by that of Ritchie & Dunnavant, in the city of Richmond and in the county of Henrico.

We further certify that the dimensions, situation, and contiguity to other buildings or wharves, what the walls are built of, and what the buildings are covered with, are truly specified on the annexed plat; and we, the undersigned appraisers, have valued the said building, and certify their actual value to be as expressed in our certificate hereunder, to wit:

Marked:

The dwelling and boarding and vault.....	A at	$6,000—	say dollars.
The kitchen.....	B at	800	do.
The dwel'g, board'g-house, and vault.....	C at	6,000	do.
The kitchen.....	D at	800	do.
The dwelling, board'g-house, and vault....	E at	6,000	do.
The kitchen.....	F at	600	do.
The.....	G at	.....	do.
The.....	H at	.....	do.
		$20,200	

Say twenty thousand two hundred dollars.

We, the underwritten, declare and affirm, that we have examined the above-mentioned buildings of Seymour P. Vial, and we are of opinion that, having regard to their local situation, state of repair, and the

present cost of building, they are now actually worth twenty thousand two hundred dollars in ready money, as above specified, to the best of our knowledge and belief.

As witness our hands, this 25th day of October, one thousand eight hundred and fifty-eight.

I. A. GODDIN,
G. D. SHELL,
Appraisers.

I, the undersigned, do hereby certify that I verily believe the buildings herein described are not overvalued.

SAM'L H. PULLIAM,
Special Agent.

(See MS. record for diagram.)

23 Marks and use in declaration No. 16764. | Marks and use as within described.

The buildings were formerly used as—	Formerly marked—	The building now used as—	Marked within—	Actual value.
				Dollars.
Dwelling-house and vault	A	Dwelling, b'd'g-house, and vault	A.	6,000
Kitchen	B	Kitchen	B.	800
Dwelling, board'g-house, &c.	C	Dwelling, board'g-house, &c.	C	6,000
Kitchen	D	Kitchen	D.	800
Dwelling, board g-house, &c.	E	Dwelling, board'g-house, &'	E.	6,000
Kitchen	F	Kitchen	F.	600
	G			
	H.			

Present value, 20,200.

24 CITY OF RICHMOND, *to wit:*

The within named Isaac A. Goddin and George D. Shell this day personally appeared before me, the subscriber, a notary public for the city aforesaid, and made oath that the within valuation has been made according to the best of their skill and judgment.

Given under my hand, this day of Jan'y, 1858.

SAM'L T. PULLIAM, *N. P.*

I, H. A. Claiborne, principal agent of the Mutual Assurance Society against Fire on Buildings of the State of Virginia, do hereby certify that the above and the within constitute a true copy of a declaration of revaluation filed and recorded in the general office of the said society.

In testimony whereof I hereunto subscribe my name as principal agent and affix the seal of the said society, at its office in Richmond, this 3rd day of December, 1877.

[SEAL.] H. A. CLAIBORNE.

No. 20229.

This policy of assurance (for the revaluation of the building declared for per former declaration No. 16764), witnesseth:

That Seymour P. Vial, residing at Richmond, in the county of Henrico, has entered for assurance against loss or damage by fire in the Mutual Assurance Society against Fire on Buildings of the State of

Virginia, per his declaration, No. 20229, filed and recorded in the general office, the following buildings, occupied by Mr. Pegram and Mrs. Howard, situate on the south side of Bank between 9th and 10th streets, bounded on the southeast by property lately purchased by Robert H. Maury, and on the northwest by that of Ritchie & Dunnavant in the said town of Richmond, and in the county of Henrico, to wit:

25 Building used as—	Marked—	The walls built of—	The roof covered with—	Valued at—	Nett amount insured.	Premium.
				Dollrs.	*Dolls. Cents.*	*Dolls. Cts.*
The dwelling and boarding-house and vault	A	Brick	Slate	6,000	4,800 00	72 00
The kitchen	B	do	Tin	800	640 00	9 60
The dwelling and boarding-house and vault	C	do	Slate	6,000	4,800 00	72 00
The kitchen	D	do	Tin	800	640 00	9 60
The dwelling and boarding-house and vault	E	do	Slate	6,000	4,800 00	72 00
The kitchen	F	do	Tin	600	480 00	7 20
					$16,150 00	$242 40

26 Which sum of sixteen thousand one hundred and sixty dollars is the real sum insured, and on which there has been paid two hundred and thirty-nine dollars of premium; and now this day three $\frac{40}{100}$ dollars additional premium; and he, the said assured, having by the above-mentioned declaration agreed for himself and his heirs, executors, administrators, and assigns to abide by, observe, and adhere to the constitution, rules, and regulations of this society which are already or may hereafter be established for the said assurance society; now, know all men by these presents, that the aforesaid assurance society shall be subject and liable to pay, agreeably to the acts of the legislature of Virginia, and the constitution, rules, and regulations which are already or may hereafter be established for the said assurance society, unto the said assured, or to his heirs, executors, administrators, or assigns, all such losses or damages as shall happen by fire or lightning after 12 o'clock m. of this day, to the above-mentioned buildings, according to the true intent and meaning of the said acts of the legislature of Virginia and the constitution, rules, and regulations of the said society as aforesaid; provided that the aforesaid buildings are at this instant in existence, and that if they, or any part thereof, are, or hereafter shall be, insured elsewhere, this policy shall be void.

In witness whereof the principal agent of said society has signed this present policy, with the seal of the office annexed (the same having been countersigned by his chief clerk), at the city of Richmond this 31st day of December, one thousand eight hundred and fifty-eight.

(S'g'd) J. RUTHERFOOD. [SEAL.]

Countersigned.

(S'g'd) J. B. DANFORTH, *Chief Clerk.*

Exhibits 5 and 6.—Filed with answer.

No. 20795.

Revaluation of buildings formerly declared for assurance by Seymour P. Vial, per declaration No. 16763.

I, the underwritten Seymour P. Vial, residing at Richmond, in the county of Henrico, do hereby declare for assurance in the Mutual Assurance Society Against Fire on Buildings in the State of Virginia, my

buildings on my lot on the north side of Main street, between 9th and 10th streets, now occupied by Jno. F. Regnault, situated between the tenement of Benjamin Sutton and wife on the southeast and that of Edmond A. Crenshaw on the northwest, in the city of Richmond, and in the county of Henrico, the dimensions, situation, and contiguity to other buildings or wharves, what the walls are built of, and
27 what the buildings are covered with, are truly specified on the annexed plat of the said buildings, and are valued by the appraisers, as appears by their certificate hereto attached, to wit:

Marked:

The upholsterin' and paper-hanging store	A, at $4,000, say	dollars.
The addition and workshop	B, at 1,000	do.
The	C, at	do.
The	D, at	do.
The	E, at	do.
The	F, at	do.
The	G, at	do.
The	H, at	do.
	$5,000	

Say five thousand dollars.

I do hereby declare and affirm that I hold the above-mentioned buildings, with the land on which they stand, in fee-simple, and that they are not, nor shall be insured elsewhere, and that I and my heirs and assigns will abide by, observe, and adhere to the constitution, rules, and regulations which are already established or may hereafter be established by a majority of the insured, present in person, or by representatives, or by a majority of the property insured, represented either by the persons themselves or their proxy, duly authorized, or their deputy, as established by law, at any general meeting to be held by the said assurance society; or which are or hereafter may be established by the standing committee of the society.

Witness my hand and seal this 17th day of January, 1859.

(Signed) S. P. VIAL. [SEAL.]

Teste:

(Signed) SAM'L T. PULLIAM,
Special Agent.

(See MS. record for diagram.)

The within-mentioned building, formerly insured in the name of Seymour P. Vial, per declaration No. .

28 Marked in the former declaration—	Described in the former declaration as—	Marked within—	Described within as—	Present actual value.
				Dollars.
A	Watchmaker's shop and dwelling.	A	Upholster's store, &c	4,000
B	Kitchen pulled down	B	Addition & workshop	1,000
C				
D				
E				
F				
G				
H				
Total				$5,000

29 We, the underwritten, declare and affirm that we have examined the above-mentioned buildings of Seymour P. Vial, and we are of opinion that having regard to their local situation, state of repair, and the present cost of building, they are now actually worth five thousand dollars in ready money, as above specified, *as above specified*, to the best of our knowledge and belief.

As witness our hands.

(Signed) EVAN F. RAGLAND,
(Signed) JAS. M. TAYLOR,
Appraisers.

CITY OF RICHMOND, *to wit:*

The above-named James M. Taylor and Evan F. Ragland this day personally appeared before me, the subscriber, a not'ry public for the city aforesaid, and made oath that the above valuation has been made according to the best of their skill and judgment.

Given under my hand, this day of January, 1859.

SAM'L T. PULLIAM, *N. P.*

I, the underslgned, do hereby certify that I verily believe the buildings herein described are not overvalued.

SAM'L T. PULLIAM,
Special Agent.

I, H. A. Claiborne, principal agent of the Mutual Assurance Society Against Fire on Buildings of the State of Virginia, do hereby certify that the above and the within constitute a true copy of the declaration of revaluation filed and recorded in the general office of the said society.

In witness whereof I hereunto subscribe my name, as principal agent, and affix the seal of the said society, at its office in Richmond, this third day of December, 1877.

[SEAL.] H. A. CLAIBORNE.

No. 20795.

This policy of assurance (for the revaluation of the building declared for, per former declaration, No. 16763), witnesseth:

That Seymour P. Vial, residing at Richmond, in the county of Henrico, has entered for assurance, against loss or damage by fire,
30 in the Mutual Assurance Society against Fire on Buildings of the State of Virginia, per his declaration, No. 20795, filed and recorded in the general office, the following buildings occupied by Jno. F. Regnault, situated on the north of Main, between 9th and 10th streets, and between the tenement of Benjamin Sutton and wife on the southeast, and that of Edmund A. Crenshaw on the northwest, in the said town of Richmond, and in the county of Henrico, to wit:

31 Buildings used as—	Marked—	The walls built of—	The roof covered with—	Valued at—	Nett amount insured.	Premium.
				Dollars.	*D. C.*	*D. C*
Uph lsterer's and paper-h a n g i n g store.	A.....	Brick.....	Slate. ..	4,000	3,200 00	48 00
Addition and workshop.	B.....	Brick.....	Tin, wood, and slate.	1,000	800 00	16 00
					$4,000 00	$64 00

32 Which sum of four thousand $\frac{00}{100}$ dollars is the real sum insured, and on which there has been paid fifty-three $\frac{50}{100}$ dollars, premium, and now this day ten $\frac{50}{100}$ dollars, additional premium, and he, the said assured, having by the above-mentioned declaration agreed for himself and his heirs, executors, administrators, and assigns to abide by, observe, and adhere to the constitution, rules, and regulations of this society, which are already or may hereafter be established for the said assurance society; now know all men by these presents that the aforesaid assurance society shall be subject and liable to pay, agreeably to the acts of the legislature of Virginia and the constitution, rules, and regulations which are already or may hereafter be established for the said assurance society, unto the said assured, or to his heirs, executors, administrators, or assigns, all such losses or damages as shall happen by fire or lightning after 12 o'clock m. of this day to the above-mentioned buildings, according to the true intent and meaning of the said acts of the legislature of Virginia and the constitution, rules, and regulations of the said society as aforesaid; provided, that the aforesaid buildings are at this instant in existence, and that if they or any part thereof are, or hereafter shall be, insured elsewhere, this policy shall be void.

In witness whereof the principal agent of the said society has signed this present policy with the seal of the office annexed, the same having been countersigned by his chief clerk, at the city of Richmond, this 19th day of January, one thousand eight hundred and fifty-nine.

(Signed) J. RUTHERFOORD. [SEAL.]

Countersigned.

(Signed) J. B. DANFORTH, *Chief Clerk.*

Exhibits 7, 8, and 9.—Filed with answer.

No. 7.

At a meeting of the standing committee of the Mutual Assurance Society held on the 17th June, 1861—

* * * * * * *

The principal agent submitted to the board the question of the society's liability for indemnity to William A. Anderson for loss and to Mrs. Selina Barclay, ad'x of Robert Dickson, for damage resulting from "fire applied to the buildings in the Gosport navy-yard by persons in the service of the U. S. Government," both buildings being sit-

33 uated in Portsmouth and insured, the former by policy No. 876 A, and the latter by policy No. 18711; whereupon the principal agent was requested to procure further facts in regard to the building before action be taken thereon.

The question whether the society would take war-risks or not was considered and unanimously rejected.

A true copy from the record.

H. D. DANFORTH, *Secretary.*

At a meeting of the standing committee of the Mutual Assurance Society, held on the 24th of July, 1861—

* * * * * * *

The principal agent presented the following statements of loss and damage by fire, viz:

Statement of the claims of Selina Barclay, executrix of John Dickson, dec'd, and tenant for life as to one-third, and of Rosa H. Barclay, Eleanor Hubert, and her husband, Caleb Hubert, Sarah Emma Boutwell, Selina Christiana Pendleton, and her husband, Garland Pendleton, J. Ann Barclay, and her husband, Alexander, Solomon Tatum Barclay, and Selina Catharine and Robert Barclay Reill, minors, by their guardian and father, Robert Reill, owners, partly in fee and partly as reversioners, for loss by fire on 21st of April, 1861, of three buildings in Portsmouth, insured as a tavern and kitchen by policy No. 18711, dated 31st December, 1857, and designated therein by letters A and B.

Building A valued when insured and at the time of burning, at $1,800, and insured for $\frac{4}{5}$—say	$1,440 00
Building B, valued when insured and at the time of burning, at $150, and insured for $\frac{4}{5}$—say	120 00
Gross loss	$1,560 00
Off $\frac{1}{20}$ cts. salvage, estimated at $20—say	16 00
Net loss	$1,544 00

The buildings above referred to were property insured by John Dickson, who, by his will (submitted herewith) loaned to his wife, the claimant (then Selina Dickson, and now Selina Barclay, the widow of Robert Barclay, dec'd), during her life, one-third part of all his lands and real estate, and made her the sole executrix of his will. He devised and bequeathed the residue of his estate to his four daughters first herein named, and to his son, George W. Dickson, who transferred his interest to Robert Barclay, since deceased (the husband of
34 of Rosa H. Barclay above named). One-half of his property became the property of his widow; one-fourth, the property of his brother, the above-named Solomon T. Barclay, and one-fourth the property of his deceased sister, whose interest therein is owned by her two children, the above-named Selina Catharine Reill and Robert Barclay Reill, who are yet minors. The information in regard to the interests of the claimants in this case is derived mainly from correspondence with an agent, and is believed to be correct. But the question is respectfully submitted to the committee, whether, from the facts stated in the affidavit of the claimant, Mrs. Barclay, and in the letter of our agent, Mr. Wm. H. Hunter, the society is responsible for this loss, resulting, as it evidently did, from "civil commotion" or the "invasion of a foreign enemy." On this question the committee is referred to art. 10, sections 11 and 12 of the by-laws.

J. RUTHERFOORD, *P. Agt.*

JULY 24TH, 1861.

Statement of the claim of William A. Anderson for damage by fire on the 21st of March, 1861, to his building in Portsmouth, insured as a dwelling by policy No. 876 A, dated 15th March, 1861.

Building damaged, per estimate	$340 00
Off $\frac{1}{5}$ for the proprietor's risk	68 00
Net damage	$272 00

The building above referred to was properly insured, and the fire by

which it were damaged was no doubt accidental as to the claimant. It appears, however, by his affidavit and by a letter from our agent, Mr. Wm. H. Hunter, submitted herewith, that the above-mentioned damage resulted from "fire from the Gosport navy-yard, applied to buildings in the yard by persons in the service of the United States," evidently referring to the designed and hostile conflagration of the navy-yard by the soldiers, sailors, and mariners of the United States at the time the building were damaged.

It appears to the undersigned that the fire or loss consequent thereon were the results of such a "civil commotion" or "invasion of a foreign enemy" as by 10th article and 11th and 12th sections of our rules, &c., exonerates the society from all liability for the loss. The question is respectfully submitted to the committee. It also appears from the affidavit of the claimant, that the property damaged was, at the time of burning, subject to a deed of trust in favor of W. B. Mintee and John Hobdery, whose interests will be duly noticed in the warrant, should the claim be allowed.

J. RUTHERFOORD, *Pr. Ag't.*

JULY 24TH, 1861.

35 On consideration of the foregoing statements and letters from Mr. William H. Hunter (the society's local agent), setting forth the facts of the burning, it was resolved that payment be declined.

A true copy from the record.

H. D. DANFORTH, *Secretary.*

EXHIBIT No. 8.

At a meeting of the standing committee of the Mutual Assurance Society held on the 17th of May, 1865—

* * * * * * *

It was ordered that the quotas of 1865 be remitted on all insured buildings destroyed by fire upon the evacuation of Richmond (April 3d, 1865), and on other insured buildings in the State burnt under similar circumstances.

* * * * * * *

A true copy from the record.

H. D. DANFORTH, *Secretary.*

EXHIBIT No. 9.

At a meeting of the standing committee of the Mutual Assurance Society held on the 31st of July, 1865—

* * * * * * *

On motion,

Resolved, That section 4th, article 11th of the constitution, rules, and regulations shall be construed to apply to insured buildings destroyed during the war under circumstances exonerating the society from liability for loss.

* * * * * * *

A true copy from the record.

H. D. DANFORTH, *Secretary.*

Exhibit G.—Filed by def't.

At a called meeting of the council at Richmond, February, 24th, 1865—

36 "The mayor appeared in the chamber and, on Mr. Scott's motion, was allowed to address the council. He proceeded to do so, and submitted the following papers as indicating the special business upon which he desired the action of the council, to wit:

"HEADQ'R'S ARMY OF NO. VA., *Feb'ry 21st*, 1865.

"LT.-GEN'L R. S. EWELL, *Commanding Dep't of Richmond:*

GEN'L: The commanding general bids me send you the enclosed order, alluded to in my letter of yesterday with the request that you carry it out in the city of Richmond, as he thinks the necessity alluded to in the order has arisen. All the cotton and tobacco stored in the city, which the owners cannot remove, must be destroyed. This of course does not include the French tobacco.

I am very resp'ly, y'r ob't s'v't,

C. S. VENABLE, *A. A. G.*

Official:

CAMPBELL BROUN, *A. A. G.*

Hon. JOS. MAY:

DEAR SIR: I send you the copies I promised. A list of all the citizens known by the "common council" to own cotton or tobacco in the city will assist Gen'l Ewell in the matter. Also any other information they can give.

Resp'y,

CAMPBELL BROUN, *A. A. G.*"

Mr. Burr thereupon submitted the following preamble and resolution, which were read and adopted, to wit:

This council having been advised by the mayor that an order has been given for the removal or destruction of the cotton or tobacco in the city by the military authorities, and this council having no discretion or power to act in the matter farther than to take such precaution as circumstances permit against the destruction of property not included in the order—

Resolved, That a committee of six members, consisting of the president of the council and five others appointed by him, shall confer with the mayor and aid him in his effort to see that the destruction of the cotton and tobacco be affected by the military authorities with as little damage to the city and other property as possible.

Committee appointed by the president, to wit:

Messrs. Burr, Scott, Haskins, Stokes and Glazebrook.

37 At a called meeting of the council of Richmond, February 27th, 1865—

The president remarked that the meeting had been convened by request of certain members of the council, all of whom were present, and its object could be stated by some of them.

Mr. Scott announced that Major Carrington, provost marshal, was present, and desired to confer with the council, and moved that the major be allowed to address the council.

Major Carrington proceeded to do so, and submitted a written statement representing to the council that he had "received orders from

the proper military authority to cause the immediate removal from the city of all manufactured and leaf tobacco," and proposing to require its removal to Lynchburg, and respectfully inviting "the co-operation of the council, believing that such co-operation will promote the security of the city and the protection of the rights of individuals. If the tobacco be not removed it will be destroyed whenever the military exigencies may render it necessary."

Mr. Burr thereupon offered the following resolution, which was adopted:

Resolved, That a committee of three be appointed by the president to consult with the military authorities having charge of the removal of cotton and tobacco with a view to the protection of the interests of the owners of such property as far as may be in the power of the committee.

The president announced the committee, as follows:

Messrs. Stokes, Walker, and Clopton.

I certify that the foregoing are true extracts from the proceedings of the council of Richmond as recorded in their journal, No. 15, pages 242–3, and 244.

E. C. HOWARD, *City Clerk.*

Exhibit H.—Filed with answer.

No. 21756.

We, the undersigned, Carper Wendlinger, owner of the buildings and lessee of ground belonging in fee simple to the heirs of Seymour P. Vial, deceased, for ten years from the day of , 1865, and Wellington Goddin, executor of the last will and testament of the said Seymour P. Vial, dec'd, residing Richmond, in the State of Virginia, do hereby declare for insurance in the Mutual Assurance Society against Fire on Buildings of the State of Virginia, the buildings hereinafter described, and we do also declare and affirm that we hold the said buildings, with the land on which they stand, in fee simple; that they
38 are not, nor shall be insured elsewhere; that we and our heirs and assigns will abide by, and observe, and adhere to the constitution, rules, and regulations which are or may be lawfully established by the said assurance society in general meeting, or through its standing committee, and we do hereby acknowledge the receipt of a copy of the constitution, rules, and regulations of the said assurance society.

Witness our hands and seals, this 15th day of May, 1867.

C. WENDLINGER. [SEAL.]
W. GODDIN, [SEAL.]
Ex'or of S. P. Vial, dec'd.

(See MS. record for diagram.)

The buildings within-described are situated on the north of Main street between Ninth and Tenth streets, and are bounded on the southeast by property of Benj'n Sutton and wife and on the northwest by a building of Edmund B. Crenshaw, in the city of Richmond, and is occupied by C. Wendlinger as a dwelling and a restaurant, and I recommend that the Mutual Assurance Society shall insure on A, the main building, $7,000, and on B, the kitchen, $1,000.

A, 7,000, @ 1.75	$122 50
B, 1,000, @ 1.50	15 00
	$137 50
C'r by prem. on No. 20228	53 50
	84 00
Ag't fee	3 00
	87 00
Interest	1 30
	88 30
Fractional quota	14 28
	102 58
1870—$8,000, @ 2 p'r c't	$160
C'r	137 50

No. A. P. ch'd.

1876, May 9.—Notified of lien in favor of Sam'l H. Pulliam, for about $1,200.

1877.—$8,000, @ 2.25, $180.00.

39 1878, April 23.—Notified of trust deed favor Mr. Isaac Robinson, of Petersburg, for $2,315.

I, H. A. Claiborne, principal agent of the Mutual Assurance Society against Fire on Buildings of the State of Virginia, do hereby certify that the above and the within is true copy of a declaration of assurance filed and recorded in the general office of the said society.

In testimony whereof I hereunto subscribe my name as principal agent, and affix the seal of said society, at its office in Richmond, this tenth day of December, 1878.

[SEAL.] H. A. CLAIBORNE,
Principal Agent.

The following paper is annexed to the foregoing:

I signed the paper of which the within is a copy, because I was informed, and also knew many years before, that C. Wendlinger, by the laws of the Mutual Assurance Society of the State of Virginia, could not effect the insurance in that office without my written consent.

Given under my hand, this the 10th December, 1878.

W. GODDIN,
Ex'or of S. P. Vial, Dec'd.

No. 21756.] Perpetual. $8,000.

MUTUAL ASSURANCE SOCIETY OF VIRGINIA.

This policy of assurance witnesseth that Casper Wendlinger, owner of the building and lessee of the ground for ten years from 1865, and W. Goddin, ex'or of Seymour P. Vial, dec'd, owner of the ground, have entered for assurance against loss or damage by fire or lightning, in

the Mutual Assurance Society against Fire on Buildings, of the State of Virginia, by their declaration, No. 21756, filed and recorded in the general office, to the amount of eight thousand dollars, the following buildings, viz: $7,000 on his three-story and basement, brick, tin, restaurant and dwelling, occupied by himself, and situated on the north side of Main street, the property of Benjamin Sutten and wife on the east, and that of Edmund B. Crenshaw on the northwest, in the city Richmond, Va., and $1,000 on his two-story and basement, brick, tin, kitchen in rear, on which sum there has been paid one hundred and thirty-seven $\frac{50}{100}$ dollars premium; and the said assured having by their above-mentioned declaration agreed for themselves and their heirs, executors, administrators, and assigns, to abide by, observe, and adhere to the constitution, rules, and regulations of this society which are already or may hereafter be established for the said assurance society:

Now, know all men by these presents, that in consideration of the premises, the Mutual Assurance Society against Fire on Buildings, of the State of Virginia, promise and shall be liable to pay, agreeably to the acts of the legislature of Virginia and the constitution, rules, and regulations aforesaid, unto the said assured, or to their heirs, executors, administrators, or assigns, all such damage or loss, not exceeding the sum of eight thousand dollars, as may happen by fire or lightning, after 12 o'clock at noon of this day to the above-mentioned building, said damage or loss to be ascertained by abitrators, indifferently chosen, and to be paid sixty days after notice and proof filed at the general office according to the annexed conditions: provided, that if the said building, or any part thereof, is or hereafter shall be insured elsewhere without the knowledge and consent of this society in writing, this policy shall be void; and provided further, that the annexed conditions shall be held and construed to be a part of this policy.

In witness whereof, the principal agent of the said society has signed this present policy, with the seal of the office annexed, the same having been countersigned by his chief clerk, at the city of Richmond, this 15th day of May, one thousand eight hundred and sixty-seven.

H. A. CLAIBORNE, [SEAL.]
Principal Agent.

Countersigned:

J. B. DANFORTH,
Chief Clerk.

Terms and conditions of insurance referred to in the body of the within policy.

1. Every person making a permanent insurance on any building shall pay down a certain premium for every one hundred dollars insured, according to the greater or less hazard of the building, and shall thereafter pay an annual assessment upon the premium, called a quota.

2nd. Every policy insured in the nature of a permanent insurance shall continue in force from and after 12 o'clock at noon of the day on which the premium is paid at the office, until the insurance shall be regularly withdrawn, or be forfeited by the storage of prohibited articles, or by some other violation of these conditions.

41 3. Every person who may sell or mortgage an insured building shall, without delay, give notice thereof, but this society will not be responsible for the failure of such person to notify the purchaser

or mortgagee of the existence of the assurance; and such purchaser, mortgagee, or other person who may become interested in the right to an insured building, shall be equally liable to the society for all quotas or other claims as the assured named in this policy.

4. Every person insured shall, without delay, report to the principal agent any additional hazard created or occasioned by himself or others to buildings insured, and shall also pay any additional premium arising therefrom. Failure to give such notice shall subject the assured, in the discretion of the board, to a penalty of five-fold the additional premium that would have been required.

5th. The storage of large quantities of gunpowder, tar, pitch, turpentine, oil of vitriol, burning fluid, unslacked lime, or other articles equally hazardous, in an insured house, or the alteration or general repair thereof, without the consent of the office in writing, shall forfeit this policy.

6th. No policy shall bind this society for any loss or damage which may result from riots, civil commotions, or insurrections, from the invasion of a foreign enemy, or any military or usurped power, or from the direct or indirect agency of the assured.

7th. Persons insured in this society who may sustain any damage or loss shall give immediate notice thereof to the office or its agent, and as soon after as possible shall lodge at the general office a particular account of their loss, stated when and how the fire originated, so far as they know or believe, the nature of their interest in the property, and whether insured elsewhere, in what companies, and for what amounts; which statement shall be verified by their oath or affirmation, and, unless dispensed with by the principal agent, be accompanied by an award, to be made by arbitrators indifferently chosen.

8. It shall be optional with the society to pay the amount of any award for damage or loss, or to repair or rebuild the property damaged or burnt.

9. The society shall only be responsible for the actual damage sustained, or, if total loss, for the cash value of the building at the date of the fire; provided the same do not exceed the sum insured; in case of other permitted insurance, this society to pay its pro rata of any damage.

10. Insurance in any other office, without the written consent of this office, shall render this policy void.

11. It is expressly provided that this society shall not be held liable for any loss or damage unless the assured shall demand payment within twelve months after the happening of the same; the lapse of time to be deemed as conclusive evidence against the validity of any such claim.

42 *Exhibit I.—Filed with answer.*

No. 21734.

We, the undersigned, Henry Exall, owner of the building and lessee of the ground (belonging in fee simple to the heirs of Seymour P. Vial, deceased), for 10 years from the day of , 1865, and Wellington Goddin, executor of the last will and testament of the said Seymour P. Vial, dec'd, and A. H. Sands, trustee for the benefit of Harrison, Goddin & Apperson, residing Richmond, in the State of Virginia, do hereby declare for insurance in the Mutual Assurance Society against Fire on Buildings of the State of Virginia, the building herein-

after described; and we do also declare and affirm that we hold the said building, with the land on which it stands, in fee simple; that it is not nor shall be insured elsewhere; that we and our heirs and assigns will abide by and observe and adhere to the constitution, rules, and regulation' which are or may be lawfully established by the said assurance society, in general meeting, or through its standing committee; and we do hereby acknowledge the receipt of a copy of the constitution, rules, and regulations of the said assurance society.

Witness our hands and seals this 16th day of February, 1867.

HENRY EXALL.	[SEAL.]
W. GODDIN, *Ex'or of S. P. Vial, dec'd.*	[SEAL.]
ALEXANDER H. SANDS, *Trustee.*	[SEAL.]
HARRISON, GODDIN & APPERSON.	[SEAL.]

(See MS. record for diagram.)

The within-mentioned building is situated on the south of Bank st., between 9th and 10th sts., in the city of Richmond, between the tenement of Wm. L. Montague, lessee, on the southeast, and the vacant ground of on the northwest, and is intended as a story and dwelling, at present unoccupied.

I recommend an insurance of $6,000 on the same.

SAM'L T. PULLIAM, *Agent.*

1ST JAN'Y, 1867.

43	A. $6,000 taken on it at 1.50	$90	
	Cr. By prem. on A and B, No. 20229		81 60
			8 40
Quota on 81.60			32 64
			41 04
Agent' fee			3 00
			44 04
1877.	$6,000 @ 1.70		$102 60

Exhibit K.—Filed with answer.

No. 21786.] Perpetual. [$6,000.

MUTUAL ASSURANCE SOCIETY OF VIRGINIA.

This policy of assurance witnesseth: That John Lucas and Wm. H. Lucas, partner', trading in the city of Philadelphia, under the firm of John Lucas & Co., owners of the building and lessees of the ground for ten years from July 1st, 1865, and W. Goddin, ex'or of Seymour P. Vial, dec'd, of Richmond, Va., owner of the ground have entered for assurance against loss or damage by fire or lightning in the Mutual Assurance Society against Fire on Buildings of the State of Virginia by their declaration, No. 21786, filed and recorded in the general office to the amount of six thousand dollars the following building, viz:

On the three-story brick and gutta-purcha building now occupied by Wm. L. Montague, as a boarding-house (intended to be used also as a store), with a two-story kitchen and porch attached, said premises being situated on the south side of Bank, between 9th and 10th streets,

east of the adjoining tenement of Henry Exall (on leased ground), in the city of Richmond, Virginia, on which sum there has been paid ninety dollars premium; and the said assured having, by their above-mentioned declaration, agreed for themselves and their heirs, executors, administrators, and assigns, to abide by, observe, and adhere to the constitution, rules, and regulations of this society, which are already or may hereafter be established for the said assurance society.

Now know all men by these presents:

That in consideration of the premises, the Mutual Assurance Society against Fire on Buildings of the State of Virginia promise, and shall be liable to pay, agreeably to the acts of the legislature of Virginia,
44 and the constitution, rules, and regulations aforesaid, unto the said assured, or to their heirs, executors, administrators, or assigns, all such damage or loss, not exceeding the sum of six thousand dollars, as may happen by fire or lightning after 12 at noon of this day to the above-mentioned building, said damage or loss to be ascertained by arbitrators, indifferently chosen, and to be paid sixty days after notice and proof, filed at the general office according to the annexed conditions; provided, that if the said building, or any part thereof is, or hereafter shall be insured elsewhere without the knowledge and consent of this society in writing, this policy shall be void; and provided further, that the annexed conditions shall be held and construed to be a part of this policy.

In witness whereof, the principal agent of the said society has signed this present policy with the seal of the office annexed, the same having been countersigned by his chief clerk, at the city of Richmond this 30th day of August, one thousand eight hundred and sixty-seven.

H. A. CLAIBORNE, [SEAL.]
Principal Agent.

Countersigned.

J. B. DANFORTH,
Chief Clerk.

Terms and conditions of insurance referred to in the body of the within policy. (See page 53.)

EXHIBIT K.

No. 21786.

We, the undersigned, John Lucas and Wm. H. Lucas, partners, trading in the city of Philadelphia, under the firm of John Lucas & Co., owners of the building and lessees of the ground for ten years from 1st July, 1865, and Wellington Goddin, executor of Seymour P. Vial, dec'd, owner of the land, residing at Richmond, Va., do hereby declare for insurance in the Mutual Assurance Society against Fire on Buildings of the State of Virginia the building hereinafter described; we do also declare and affirm that we hold the said building with the land on which it stands in fee simple, that it is not, nor shall be insured elsewhere, except by consent of the said Mutual Assurance Society; that we and our heirs and assigns will abide by and observe and adhere to the constitution, rules, and regulations which are or may be lawfully established by the said assurance society in general meeting, or
45 through its standing committee, and we do hereby acknowledge the receipt of a copy of the constitution, rules, and regulations of the said assurance society.

Witness our hands and seals this thirteenth day of August, 1867.

JOHN LUCAS. [SEAL.]
WM. H. LUCAS. [SEAL.]
W. GODDIN, [SEAL.]
Ex'or of S. P. Vial, dec'd.

(See MS. record for diagram.)

The within-mentioned building is situated on the south side of Bank street between 9th and 10th streets, in the city of Richmond, east of the tenement of Henry Exall, on leased ground, and is used and occupied by Wm. L. Montague as a dwelling and boarding house, and intended to be used also as a store.

I recommend an insurance of $6,000 on the same.

J. B. DANFORTH, *Agent.*

A, $6,000 taken @ 1½ per ct	$90 00
Cr. by prem. on C & D of No. 20229	81 60
	8 40
4 mo.'s quota on $81.60	10 88
	19 28
Survey	3 00
	$22 28
1877—$6,000, @ 1.70	$102 00

I, H. A. Claiborne, principal agent of the Mutual Assurance Society against fire on buildings of the State *of the State* of Virginia, do hereby certify that the above and the within is a true copy of a declaration of assurance filed and recorded in the general office of the said society.

In testimony whereof I hereunto subscribe my name as principal agent and affix the seal of the said society, at its office in Richmond, this tenth day of December, 1878.

[SEAL.] H. A. CLAIBORNE,
Principal Agent.

46 The following paper is annexed to the foregoing:

I signed the paper of which the within is a copy because I was informed, and also knew many years before, John Lucas and W. H. Lucas, by the laws of the Mutual Assurance Society of the State of Virginia, could not effect the insurance in that office without my written consent.

Given under hand this the 10th December, 1878.

W. GODDIN,
Ex'or of S. P. Vial, dec'd.

EXHIBIT H.

No. 21756.] Perpetual. [$8,000.

MUTUAL ASSURANCE SOCIETY OF VIRGINIA.

This policy of assurance witnesseth that Casper Wendlinger, owner of the building and lessee of the ground for ten years from 1865, and

W. Goddin, ex'or of Seymour P. Vial, dec'd, owner of the ground, has entered for assurance against loss or damage by fire or lightning in the Mutual Assurance Society against fire on buildings, of the State of Virginia, by their declaration, No. 21756, filed and recorded in the general office, to the amount of eight thousand dollars, the following building, viz:

$7,000 on his three-story and basement brick-tin restaurant and dwelling, occupied by himself, and situated on the north side of Main street, the property of Benjamin Sutton and wife, on the east, and that of Edmund B. Crenshaw on the northwest, in the city of Richmond, Va.; and,

$1,000 on his two-story and basement brick-tin kitchen in rear, on which sum there has been paid one hundred and thirty-seven $\frac{50}{100}$ dollars premium; and the said assured having by their above-mentioned declaration agreed for themselves and their heirs, executors, administrators, and assigns to abide by, observe, and adhere to the constitution, rules, and regulations of this society which are already or may hereafter be established for the said assurance society:

Now know all men by these presents, that in consideration of the premises the Mutual Assurance Society against fire on buildings, of the State of Virginia, promise and shall be liable to pay, agreeably to the acts of the legislature of Virginia and the constitution, rules, and regulations aforesaid, unto the said assured, or to their heirs, executors, administrators or assigns, all such damage or loss, not exceeding the sum of eight thousand dollars, as may happen by fire or lightning
47 after 12 o'clock at noon of this day, to the above-mentioned building, said damage or loss to be ascertained by arbitrators indifferently chosen, and to be paid sixty days after notice and proof, filed at the general office, according to the annexed conditions; provided that if the said building or any part thereof is or hereafter shall be insured elsewhere, without the knowledge and consent of this society in writing, this policy shall be void; and provided further, that the annexed conditions shall be held and construed to be a part of this policy.

In witness whereof the principal agent of the said society has signed this present policy, with the seal of the office annexed, the same having been countersigned by his chief clerk, at the city of Richmond, this 15th day of May, one thousand eight hundred and sixty-seven.

H. A. CLAIBORNE, [SEAL.]
Principal Agent.

Countersigned.

J. B. DANFORTH,
Chief Clerk.

Terms and conditions of insurance referred to in the body of the within policy.

(See page 53.)

Exhibit H, filed with answer.

No. 21756.

We, the undersigned, Casper Wendlinger, owner of the buildings and lessee of ground (belonging in fee-simple to the heirs of Seymour P. Vial, dec'd), for ten years from the day of , 1865, and Wellington Goddin, executor of the last will and testament of the said Seymour P.

Vial, dec'd, residing Richmond, in the State of Virginia, do hereby declare for insurance in the Mutual Assurance Society against fire on buildings, of the State of Virginia, the buildings hereinafter described, and we do also declare and affirm that we hold the said buildings with the land on which they stand in fee-simple; that they are not nor shall be insured elsewhere; that we and our heirs and assigns will abide by and observe and adhere to the constitution, rules, and regulations which are or may be lawfully established by the said assurance society, in general meeting or through its standing committee, and we do hereby acknowledge the receipt of a copy the constitution, rules, and regulations of the said assurance society.

Witness our hands and seals this 15th day of May, 1867.

C. WENDLINGER. [SEAL.]
W. GODDIN, [SEAL.]
Ex'or of S. P. Vial, dec'd.

48 (See manuscript record for diagram.)

The buildings within described are situated on the north of Main street, between Ninth and Tenth streets, and are bounded on the southeast by property of Benj'n Sutten & wife, and on the northwest by a building of Edmund B. Crenshaw, in the city of Richmond, and is occupied by C. Wendlinger, as a dwelling and restaurant, and I recommend that the Mutual Assurance Society shall insure on A, the main building, $7,000, and on B, the kitchen, $1,000.

A, 7,000 @ 1.75	$122 50
B, 1,000 @ 1.50	15 00
	137 50
Com's of prem. on No. 20228	53 50
	84 00
Ag't's fee	3
	87 00
Interest	1 30
	88 30
Fractional quota	14 28
	102 58

1870, $8,000 @ 2 p'r c't	$160
" Cr	137 50

No. A. P., ch'd.

1876, May 9. Notified of lien in favor of Sam. H. Pulliam, for about $1,200.

1877, $8,000 @ 2.25	$180 00

1878, April 23d. Notified of trust-deed from Mr. Isaac Robinson, of Petersburg, for $2,315.

I, H. A. Claiborne, principal agent of the Mutual Assurance Society against fire on buildings, of the State of Virginia, do hereby certify that the above and the within is true copy of a declaration of assurance filed and recorded in the general office of the said society.

In testimony whereof I hereunto subscribe my name as principal

agent, and affix the seal of the said society, at its office in Richmond, this tenth day of December, 1878.

[SEAL.] H. A. CLAIBORNE,
Principal Agent.

49 The following paper is annexed to the foregoing:

I signed the paper of which the within is a copy because I was informed, and also knew many years before, that C. Wendlinger, by the laws of the Mutual Assurance Society of the State of Virginia, could not effect the insurance in that office without my written consent.

Given under my hand this the 10th December, 1878.

W. GODDIN,
Ex'or of S. P. Vial, dec'd.

Agreement of counsel.

VIAL'S EX'OR
vs.
THE MUTUAL ASS. SOCIETY OF VA.

In the chancery court of the city of Richmond.

We, the undersigned, counsel in the above-entitled cause, hereby agree that upon the hearing thereof the following papers shall be used as evidence:

1st. The two affidavits of Wellington Goddin marked respectively A and B.

2d. The affidavit of Mr. Wickham, marked C.

3d. The affidavit of James A. Scott, marked D.

4th. The affidavit of Maj. I. H. Carrington, marked E.

5. The affidavit of Col. B. S. Ewell, marked F.

6. The affidavit of H. Danforth, marked G.

7th. The letters of James Lyons to H. A. Claiborne, and the replies thereto, marked 1, 2, 3, 4.

8. The three applicatons for insurance, together with the statement of Wellington Goddin, appended to each, marked respectively H, I, and K.

9. The 2 plats of burnt district made by Pleasants and one by Grame, marked respectively No. 1 and L, No. 2 and M.

10th. Map of Richmond City, marked N.

11th. Copies of leases by W. Goddin, executor, marked respectively O, P, Q.

We also agree the following facts, viz:

1st. That W. Goddin is the executor of Vial, whose will was duly recorded and a copy of which, marked W, is in the papers to be used as evidence.

2d. That the quantity of tobacco in the warehouse, No. 1, 2, & 3, Grame's plat, when the fire occurred, was from 6,000 to 7,000 hogsheads.

50 We further agree the facts stated in the paper filed and marked "Agreed facts"; and we consent that the proceedings of the city council of the city of Richmond, in paper marked G T, shall be used as evidence; and we agree that the statements contained in paper marked X are facts, but are to be taken subject to all objection upon the ground that they are not proper legal evidence.

Either side is at liberty to introduce any act of the Confederate Con-

gress bearing upon the matters in controversy, and the exhibits filed with the pleadings are admitted as evidence.

JAMES LYONS,
W. W. GORDON,
W. W. CRUMP,
of Counsel for Def'ts.
JAMES NEESON.

Affidavits of Wellington Goddin, referred to the foregoing agreement.

A.

CITY OF RICHMOND, *to wit:*

This day Wellington Goddin personally appeared before me and made oath that in the year 1865 or 1866, soon after Mr. John Grame's houses were burnt, he called on Col. John Rutherfoord, then the principal agent of the Mutual Assurance Society vs. fire on buildings, and asked him if he would pay the losses, and the col. replied that the society could not pay, because the fire which destroyed the buildings was an act of war.

Given under my hand this 12th day of January, 1877.

JOHN T. GODDIN, *N. P.*

The foregoing is a true copy of an affidavit filed in the suit of Grame's ex'or v. Mutual Assurance Society, lately pending in the circuit court of the city of Richmond.

Teste:

ALFRED SHEILD, *Clk.*

OCT. 19, 1877.

B.

I hereby certify that I have not erected any house or houses on the land on which the burnt houses stood, and therefore have not insured any. I leased the land for a term of ten years to Henry Exall, William L. Montague, a Mr. Myers, who afterwards subleased to Casper
51 Wendlinger and Juan Pizzini by written leases, copies of which will be herewith filed, though they are all recorded in Richmond chancery court. By these leases, as will be seen, the lessees contracted to erect buildings upon the terms expressed in said leases, and to keep the buildings insured for the entire term for which they were leased. I received nothing from the insurance company, nor were the lessees bound to insure in any particular company, and no conversation ever passed, as far as I now recollect and believe, between the principal agent of the Mutual Assurance Society or any other agent of that society in respect to the manner in which the premiums were to be paid. I did not consider myself at all interested in that question; because I am not the party insuring, and the tenants were bound to insure without reference to what it cost to do so.

I never said or did anything, so far as I know or believe, to induce the Mutual Assurance Society to insure said buildings, or which could in any manner mislead them into the belief that I would not as executor of Seymour P. Vial, dec'd, claim full satisfaction for the losses which Mr. Vial's estate had sustained by the great fire of the 3d April, 1865, nor did I ever say or do anything which would or could properly be regarded as barring or estopping me from the right to sue for and recover the amount for which the said society was liable for the de-

struction of said Vial's property by the fire aforesaid. I did not sue sooner than I did, because the principal agent of the society (John Rutherfoord) said that the society was not liable, because the said fire was an act of war, and therefore the said society would not pay anything, and the boldness and confidence with which this declaration was made to me and others, and the absence of the courts, and the state of disturbance and distress in the city of Richmond, deterred me from consulting counsel on the subject, but when I did consult counsel, and was told I had the right to recover I brought suit, which suit is now pending in the chancery court of the city of Richmond. After the houses erected by said tenants had been insured, I was called upon by the tenants whether they might have the benefit of the premiums upon the burnt property which stood on the books of the society to the credit of said Vial's estate, and I gave my consent to their receiving the same believing that if they did not receive them the society would be bound to refund them to Mr. Vial's estate, as the property for insuring which (the premiums had been paid) had been destroyed, and I thought therefore I had the right to let the tenants have the benefit of them, but I never intended thereby to release any right of Mr. Vial's estate (except the right to those premiums), and never suspected for a moment that by consenting to the tenants receiving them could effect or impair my rights under the policies of insurance, whatever they might be, and, so far as I now recollect, never said or did anything to induce the
52 society to insure the new buildings, which, as I have said, had been insured by the tenants before anything was said to me about the old premiums.

Given under my hand this the 11th May, 1878.

W. GODDIN,
Ex'or of Seymour P. Vial, dec'd.

CITY OF RICHMOND, *to wit:*

I, John T. Goddin, a notary public for the city aforesaid, do hereby certify that Wellington Goddin, ex'or of S. P. Vial, deceased, personally appeared before me, in my city aforesaid, and made oath that he verily believes the statements made in the foregoing paper are substantially true to the best of his knowledge and belief.

Given under my hand this the 11th May, 1878.

JOHN T. GODDIN, *N. P.*

Affidavit of Maclurg Wickham.—Exhibit C.

In the spring or summer of 1865, and certainly very early after the fall of Richmond, being in the city I asked the late Col. John Rutherfoord, who was the principal agent of the Mutual Assurance Society of Virginia, whether the company would pay the losses occasioned by the fire of April 3d, 1865, by which a great many buildings were destroyed, and he promptly replied, "Certainly not;" I myself had property insured in that company, but had no buildings burned.

MACLURG WICKHAM.

RICHMOND, VIRGINIA, *February 15th*, 1877.

The foregoing is a true copy of a paper filed in the suit of Græme's ex'or vs. Mutual Assurance Society of Va., in a suit lately pending in the circuit court of the city of Richmond.

Teste:

ALFRED SHEILD, *Clk.*

Affidavit of J. A. Scott.—Exhibit D.

STATE OF VIRGINIA,
City of Richmond, to wit:

This day personally appeared before the undersigned, a notary public in and for the city aforesaid, James A. Scott, and deposed as follows: That for many years prior to the late war he was engaged in the tobacco business in the city of Richmond; that during and at
53 the close of the war he was interested in the ownership and control of a large amount of leaf tobacco, and that he had for a long while been a member of the city council of Richmond; that when it was understood on Sunday, the 2d April, 1865, the city was to be evacuated by the Confederate Government upon the approach of the United States forces, he was appointed by the council of the city one of the committee to meet the enemy and surrender the city; that sometime after midnight, on the morning of the 3d April, 1865, he in company with other members of the committee, and with Judge John A. Meredith and Judge William H. Lyons, who had been requested by the council to act with the committee and with Joseph Mayo, esq., mayor of the city, went out to meet the enemy and surrender the city; that having taken a position and awaited their arrival, the party after a while were met by the enemy, when a formal surrender of the city was made; that this was about two miles from the corporation line on the Osborne turnpike near the James River; that the Federal commander stated on the occasion, to Mr. Mayo, that he would at once send a party forward to destroy all the liquor in the city before the arrival of the main body of the troops, when he was informed by Mayor Mayo that his action had been anticipated by the city council, who had already had everything of the kind destroyed. On returning towards the city, and when about a mile and a half distant, upon an elevated point of the road, he saw that the tobacco warehouses in the city were on fire, and among them two belonging to his mother, situated on 21st street, in which a large amount of tobacco was stored. This was about sunrise. That on taking possession of the city the United States Army did not seize any tobacco belonging to private persons so far as this affiant ever knew or heard; he and his brother-in-law, Mr. Clark, were fortunate enough to save some $10,000 worth of tobacco by having it stored in a house distant from the warehouse, although they gave a list of it with their other tobacco to the Confederate Government in due time for its destruction. This tobacco, some two or three weeks after the capture of the city, with the full knowledge of the officers *of the officers* of the United States Army, Mr. Clark and himself shipped at the dock in a schooner via New York for Liverpool and London, receiving astonishingly large prices therefor. Other citizens of Richmond, owners of tobacco, sold it here and elsewhere without molestation from the Federal Government, which, so far as this affiant ever heard, never troubled any tobacco in Richmond, except that which belonged to the Confederate Government.

JAMES A. SCOTT.

Sworn to before me this 16th day of May, 1877.

J. L. APPERSON, *N. P.*

54 The foregoing is a copy of a paper filed in the suit of Græme's ex'or vs. The Mutual Assurance Society of Va., lately pending in the circuit court of the city of Richmond.

Teste:

ALFRED SHEILD, *Clk.*

Statement of Isaac H. Carrington.—Exhibit E.

RICHMOND, *November 12th*, 1873.

I am requested to state my knowledge of facts connected with the fire of April 3d, 1865, in the city of Richmond. I was at that date provost marshal of the city under appointment of sec. of war of Confederate States. I reported to General Ewell as my commanding officer in all matters relating to the city. Some weeks before the evacuation of Richmond, General Ewell sent for me and informed me that he had orders to destroy all tobacco, cotton, and military and naval stores in the city in the event that its evacuation became necessary. He instructed me to make enquiry as to the amount and location of these articles in the city. I soon after reported to him that there was no considerable quantity of any of these articles, excepting tobacco, of which there was a large quantity. Gen'l Ewell took steps for having the leaf tobacco in the city as far as possible kept in Shockoe and in Von Groning's warehouse on Cary street, and in the warehouse at the Petersburg depot. We had frequent conversations on the subject, in which he deplored the necessity for executing the order, and expressed the hope that it could be avoided. On Sunday, Ap'l 2, '65, Gen'l Ewell sent for me, informed me that the city must be evacuated, and directed me to prepare for burning the warehouses aforesaid, but not to apply fire until the last moment. I sent officers to these three warehouses with orders to prepare combustibles in such manner that they could be quickly fired, and to place a sufficient guard at each to prevent any disturbance. I also sent an officer to communicate with the chief of the fire dep't of the city to inform him of the location of fire and to require him to have the firemen, and their engines on the ground to prevent the spread of the flames. The officer reported that he had communicated with the person second in authority, the chief of the fire department being out of the city. During Sunday night I was several times at the office of the sec't'y of war (Gen'l Breckenridge). I recollect that I informed him of the orders I had received and of the action I had taken. He said that it was a necessity; that the orders must be carried out, with all precautions taken to prevent a spread of the fire. My final orders from Gen'l Ewell were, to remain in the city as long as I
55 could with safety, and to preserve order as far as possible with the troops under my command, and to fire the tobacco before I left. Gen'l Ewell and Gen'l Breckenridge left the city together, by way of Mayo's bridge, about or a little before daybreak of Monday, 3d of April. I parted with them at corner 14th and Cary streets, as they rode off. General Ewell said to me just as he left that the firing of tobacco could not be longer delayed.

I gave the orders to two of the men with me, and they at once communicated them to the officers on guard at the warehouses. The fire was applied at once at Shockoe's and Von Groning's warehouses. The officers at the warehouse at the Petersburg depot sent me word that a number of wounded Confederate soldiers had been laid in that warehouse, and that they could not be removed. I directed the combustibles collected at that place to be removed, and countermanded the order for burning it. The night was remarkably still. I remarked the fact several times during the night, that there was not a breath of air stirring. Very soon after the warehouses were fired the wind rose from the so'east, and in a short time quite a breeze was blowing from that direction. I left the city just about sunrise Monday morning by the river road or plank road, going up the river.

ISAAC H. CARRINGTON.

The foregoing is a copy of a paper filed in the suit of Græme's ex'or vs. Mutual Assurance Society of Va., lately pending in the circuit court of the city of Richmond.

Teste:

ALFRED SHEILD, *Clk.*

OCTO. 19TH, 1877.

EXHIBIT F.—*Statement of Benj. S. Ewell.*

Statement of Col. Benj. S. Ewell, a member of Gen'l Ewell's staff, in relation to the burning of Richmond in 1865, made Nov. 5th, 1873.

Shortly after the capture of Savannah by Gen'l Sherman, a law was passed by the Confederate Congress requiring military commanders to destroy all articles of value within their commands rather than let them fall in the hands of the hostile forces. A month or two before the evacuation of Richmond, Gen'l Lee sent a notice to Gen'l Ewell of this law, with directions that steps be taken to carry it out should
56 it become necessary to give up the city. It was suggested that to prevent risk, as far as possible, of a general conflagration, the city authorities be at once consulted, and the articles to be destroyed (tobacco, of which there was a large quantity in the city, and which could only be destroyed at short notice, by firing, was especially mentioned), stored in isolated buildings. Gen'l Ewell had frequent consultations with mayor and other city authorities, and with the holders of the tobacco, which resulted in the selection of certain warehouses from which the flames would not, it was hoped, spread, should it become necessary to apply the torch for the purpose of destroying the tobacco they contained. Every step was taken by Gen'l Ewell to prevent disastrous results in the event of executing this order. It was a matter that gave him much anxiety, and to which he gave much time and attention. The final orders were given on the night of the evacuation of the city by the Confederate forces, by Gen'l Ewell, he acting under the commands of his military superiors, to apply the torch, and it was done about daybreak on Monday morning. The fire spread rapidly, even the wind from the southeast became brisker, and the entire city—the flames began at the southeast—was in imminent danger of falling a prey to the advancing conflagration. It was checked about one o'clock p. m. of Monday, principally by the exertions of the division of the U. S. Army that belonged to the command of Gen'l Wetzel, and which first entered the city. To the credit of this officer it ought to be known, that when his command, consisting of two divisions, one white, the other colored troops, the latter being in front, approached the city, he changed the order of his march and put the white soldiers in front, when he saw the fire, as being less likely to commit excesses, and being more skilled and experienced in extinguishing fires. This is the substance of my knowledge of the burning of the city.

BENJ. S. EWELL.

The foregoing is a true copy of a paper filed in the suit of Græme's ex'or vs. Mutual Ass. Society of Va., in a suit lately pending in the circuit court of the city of Richmond.

Teste:

ALFRED SHEILD, *Clk.*

EXHIBIT G.

RICHMOND, *January 4th*, 1877.

I, Henry D. Danforth, do certify that I have been employed in the office of the Mutual Assurance Society since June 5th, 1865, and am now the secretary of the society. I find that a store situated
57 on the south side of Bank, between 9th and 10th streets, in Richmond, built by John Lucas and William H. Lucas upon ground leased from W. Goddin, ex'or of Seymour P. Vial, was declared for insurance in this society on 30th August, 1867. In order to secure the credit of the premium originally paid on the buildings burnt on 3rd April, 1865, which stood on the same site, and which was authorized by the board in consequence of the society's absence of liability for the losses of that day, it was necessary for Mr. W. Goddin, ex'r of S. P. Vail, to unite in the declaration, which he did. The premium charged was $90, credited by $81.60, leaving only to be paid an additional premium of $8.40, and a fractional quota of $10.88, thus securing a saving to the insured of $70.72, which they would otherwise have paid. In this case no demand for payment was made, no estimate or proof of loss has ever been filed, and the first notice of claim given to the society was the institution of suit.

H. D. DANFORTH.

STATE OF VIRGINIA,
City of Richmond, to wit:

I, J. M. Murray, a notary public for the city aforesaid, in the State of Virginia, do certify that Henry D. Danforth personally appeared before me in my said city, and having signed the within certificate, made oath to the truth of the statements therein contained.

Given under my hand this 18th day of January, 1877.

J. M. MURRAY, *N. P.*

Correspondence between James Lyons, esq., and H. A. Claiborne, agent of the Mut. Ass. Soc. of Va.

EXHIBITS 1, 2, 3, 4.

RICHMOND, *May 17th*, 1870.

To H. A. CLAIBORNE, Esq., *P. A. M. A. S.:*

DEAR SIR: Mr. John Grame has placed in my hands sundry policies of insurance of his property (which was destroyed by fire in April, 1865) by the Mutual Assurance Society, with a view to recover the am't of the policies. I should be glad to hear from you upon the subject, as an amicable adjustment would be much more agreeable to me than a law-suit.

Very respectfully, y'rs,

JAMES LYONS.

58 [Office of the Mutual Assurance Society of Va., corner of Tenth and Bank streets. H A. Claiborne, principal agent; J. B. Danforh secretary.]

RICHMOND, *May 18th*, 1870.

JAMES LYONS, Esq., *Richmond, Va.:*

DEAR SIR: I am in receipt of your note of the 17th inst., in which you state that Mr. John Grame has placed in your hands sundry poli-

cies of insurance of his property (which was destroyed by the fire in April, 1865) by the Mutual Assurance Society, with a view to recover the amount of the policies.

In reply, I respectfully refer you to sect. 12, art. 10 of the "constitution, rules, and regulations" of the society, which is in these words:

"No policy whatever which may be issued shall bind the society to answer for losses which may result from riots, civil commotions or insurrections, from the invasion of a foreign enemy, from hurricanes or earthquakes, or from the direct or indirect agency of the proprietor of the building which may be burnt."

It may be proper to state that but two similar applications have been submitted, and upon investigation by two able lawyers in this city they were promptly abandoned.

I have only to add, that it would be easy to establish the fact that the destruction of the property referred to resulted from a risk never assumed by this society, and hence the demand you make cannot be entertained.

Very respect'ly,

HERBERT A. CLAIBORNE,
Pr. Agent.

RICHMOND, *May 24th*, '70.

DEAR SIR: Mr. Howard, who is associated with me, and myself have examined the clause of your constitution to which you referred me, and do not find anything in it to prevent Mr. Grame's recovery, but as we do not wish to institute any unnecessary suit, if you be so good as to shew the opinions of the counsel to which you refer we will examine them candidly, and if satisfied by them that we are wrong we will not sue.

Yours, truly,

JAMES LYONS.

To H. A. CLAIBORNE, Esq.

59 [Office of the Mutual Assurance Society of Va., corner of Tenth and Bank streets. H. A. Claiborne, principal agent; J. B. Danforth, secretary.]

RICHMOND, *May 23d*, 1870.

JAMES LYONS, Esq., *Richmond, Va.:*

DEAR SIR: In reply to yours of the 24th instant, in reference to the supposed claim of Mr. John Grame, I have nothing to add to mine of the 18th instant, except to repeat that the claim cannot for a moment be entertained.

I then stated that but two similar applications had been submitted, and upon investigation were promptly abandoned by counsel.

The opinions of those counsel, if reduced to writing, and for which you ask, are not in our possession, nor have we seen them.

Very respectfully, yours,

HERBERT A. CLAIBORNE,
Pr Agent.

EXHIBIT O.

This indenture, made this 2d day of May, in the year 1865, between Wellington Goddin, executor of the last will and testament of Seymour P. Vial, deceased, party of the first part, and William L. Montague, party of the second part—

Whereas by the last will and testament of the said Seymour P. Vial admitted to probat' in the hustings court of the city of Richmond, the said Wellington Goddin was duly appointed as executor thereof, and the said Goddin has qualified as such executor, and by the said will the said executor was authorized to lease or sell the real estate hereinafter mentioned, and the said Wellington Goddin as executor aforesaid has agreed to lease the real estate hereinafter mentioned unto the said Wm. L. Montague upon the terms and conditions hereinafter contained:

Now, therefore, this indenture witnesseth that the said Wellington Goddin, executor of the last will and testament of Seymour P. Vial, deceased, for and in consideration of the rents, covenants, and agreements hereinafter reserved and contained, by and on the part and behalf of the said William L. Montague, his executors, administrators, and assigns, to be paid, done, and performed, hath demised, leased, and to farm let, and by these presents doth demise, lease, and to farm
60 let unto the said William L. Montague, his executors, administrators, and assigns, all that certain lot of land lying and being in the city of Richmond, fronting on the southern side of Bank street, between 9th and 10th streets, about twenty-one feet, and running back between parallel lines the full depth of the lot, the said lot being the land on which stood the middle of the three tenements known as the Park house, to have and to hold the said lot, piece, or parcel of land and premises hereby demised and intended so to be unto the said William L. Montague, his executors, administrators, and assigns, from the first day of July, in the year 1865, for and during and until the full end and term of ten years from thence next ensuing and fully to be complete and ended, yielding and paying therefor yearly and every year for and during the said term hereby demised unto the said Wellington Goddin, executor as aforesaid of the last will and testament of Seymour P. Vial, deceased, the yearly rent or sum of one hundred and fifty dollars in gold, the payment of said rent to be as follows, in quarter-yearly payments of thirty-seven $\frac{50}{100}$ dollars each, in gold, on the first days of October, January, April, and July, in each year, the first quarter-yearly payments to be made on the first day of October, 1865, the said several rents to be paid and payable from time to time during the said term, free and clear from all taxes, charges, assessments, and payments whatsoever, taxed, charged, assessed, or imposed upon the said demised premises or buildings to be erected thereon, or any part thereof, in any wise whatsoever, during the continuance of the said term hereby granted, the said lessee, William L. Montague, undertaking to pay and discharge all such taxes, assessments, charges, and payments whatsoever during the said term. And that he, the said William L. Montague, his executors, administrators, or assigns, shall and will, before the expiration of the third year of this term hereby granted, at his and their own proper costs and charges, erect, build, complete, and finish, or cause to be erected, built, completed, and finished in a workmanlike manner, one good and substantial brick building or tenement upon the land hereby demised, the said building to be erected according to the plan made by Henry Exall, architect, on the first day of May, 1865, to which plan special reference is hereby made, and at all times from and after the said building shall be completed and finished during the remainder of the term hereby granted, the said lessee, William L. Montague, shall keep the said building or tenement in good repair. At the expiration of the term granted by this lease the said building or tenement, if then standing on the premises, is to be paid for by the lessor, or the person orpersons who shall then be entitled to enjoy the estate in the said land, the price

to be paid therefor to be ascertained in the following method by arbitration—that is to say, the said lessor or person or persons then entitled to enjoy the estate in the said land shall choose one of the arbitrators
61 and the said William L. Montague, his executors, administrators, or assigns, shall choose the *the* other arbitrator, and the two arbitrators shall then (without giving notice to either party of the time of the arbitration, though either party or both parties may, if they desire it, be present at the arbitration) view the said building or tenement, and appraise its value, to be paid as aforesaid and in cash. Should the two arbitrators differ as to the value, they are to choose an umpire, and his decision shall be final. The said William L. Montague covenants to pay the rent, to pay the taxes, to pay taxes, charges, assessments, and payments whatsoever charged, assessed, or imposed upon the said demised premises, or building to be erected thereon, for and during the said term; that he will not assign without leave, and that the lessor may re-enter for default of thirty days in the payment of rent or for the breach of the covenants. The said William L. Montague covenants to keep the said buildings or tenements insured at its full value in a solvent insurance company, and in the event the said building or tenement be consumed by fire, the insurance money is to be expended, and he hereby covenants to expend the same, in the erection of a building in all respects equal to the building so consumed by fire; and in the event such insurance money may not suffice to erect such a building, then the said lessee covenants to expend such insurance money in the erection of such a building on the said land as the said lessor may designate or prescribe.

In witness whereof the parties hereto have hereunto set their hands and affixed their seals on the day and year first herein written as the date hereof.

W. GODDIN, [SEAL.]
Ex'or of S. P. Vial, dec'd.
WM. L. MONTAGUE. [SEAL.]

STATE OF VIRGINIA,
City of Richmond, to wit:

I, A. D. Williams, a notary public for the city aforesaid, do certify that W. Goddin and W. L. Montague, whose names are signed to the writing above, dated 2d May, 1865, have acknowledged the same before me in my city aforesaid.

Given undr my hand this 6th day of December, 1865.

A. D. WILLIAMS, *N. P.*

CITY OF RICHMOND, *to wit:*

In the office of the court of hustings for the said city, the 15th
62 day of December, 1865, this deed was presented and, with the certificate annexed, admitted to record at twelve o'clock m.

Teste:

RO. HOWARD, *Clerk.*

A copy. Teste:

BENJ. H. BERRY,
Clerk Chancery Court, City of Richmond.

EXHIBIT P.

This indenture, made this 2nd day of May, 1865, between Wellington Goddin, executor of the last will and testament of Seymour P. Vial,

deceased, party of the one part, and Henry Exall, party of the other part:

Whereas by the last will and testament of the said Seymour P. Vail, admitted to probate in the hustings court of the city of Richmond, the said Wellington Goddin was duly appointed as executor thereof, and the said Goddin has qualified as such executor, and by the said will the said executor was authorized to lease or sell the real estate hereinafter mentioned; and the said Wellington Goddin, as executor afores'd, hath agreed to lease the real estate hereinafter mentioned unto the said Henry Exall, upon the terms and conditions hereinafter contained.

Now, therefore, this indenture witnesseth, that the said Wellington Goddin, executor of the last will and testament of Seymour P. Vial, deceased, for and in consideration of the rents, covenants, and agreements hereinafter reserved and contained by and on the part and behalf of the said Henry Exall, his executors, administrators, and assigns, to be paid, done, and performed, hath demised, leased, and to farm let, and by these presents doth demise, lease, and to farm let unto the said Henry Exall, his executors, administrators, and assigns, all that certain lot of land lying and being in the city of Richmond, fronting on the southeastern side of Bank street, between 9th and 10th streets, about twenty-one feet, and running back between parallel lines the full depth of the lot, being the land on which recently stood the western of the three tenements, known as the Park House: To have and to hold the said lot or piece of land and premises hereby demised unto the said Henry Exall, his administrators and assigns, from the first day of July, 1865, for and during and until the full end and term of ten years from thence next ensuing, and to be fully completed and ended, yielding and paying therefor yearly, and every year, for and during the said term hereby demised unto the said Wellington Goddin, executor as aforesaid, the yearly rent or sum of one hundred and fifty dollars in gold, the payment of said rent to be as follows, in quarter-yearly instalments
63 of thirty-seven dollars and fifty cents each on the first days of October, January, April, and July in each year during the said term, the first instalment to be paid on the 1st day of October, 1865, the said rent to be paid during the said term free and clear of and from all taxes, charges, assessments, and payments whatsoever, taxed, charged, assessed, or imposed upon the said demised property, or upon any buildings which may be erected upon the same during the said term. And the said Henry Exall, for himself, his personal representatives and assigns, undertakes and agrees that he will, before the expiation of the first year of the term hereby granted, at his own proper costs and charges, erect, build, complete, and finish, or cause to be erected, built, completed, and finished, in a workmanlike manner, one good and substantial brick building upon the land hereby demised, to front on Bank street, and to be erected according to the plan of the building made for the said lot of land by the said Henry Exall on the first day of May, 1865, to which plan special reference is here made. And at all times from and after the said building shall be completed and finished the said Henry Exall, for himself, his personal representatives and assigns, undertakes and agrees that he shall and will, during the continuance of the said term, keep the same in good repair. At the expiration of the term hereby granted, the said building, or such other building as may be erected under the provisions of this deed, shall be paid for by the lessor, or by the person or persons who may then be entitled to the said demised property, the price to be paid therefor to be ascertained and fixed in the following manner; that is to say:

The said lessor, or the person or persons then entitled to the demised property, shall choose one arbitrator, and the said Henry Exall, his personal representatives or assigns, shall choose the other arbitrator, and the two arbitrators thus selected shall (without giving notice to either party of the time and place of their meeting, but either party may be present if it is desired) view the buildings on the said demised premises, and appraise their value, to be paid in cash. Should the arbitrators thus selected differ as to the value, they shall choose an umpire, whose decision as to the value of the said buildings shall be final and conclusive between the parties. The said Henry Exall covenants to pay the rent reserved by this demise, and to pay all taxes, charges, and assessments imposed upon the said demised property during the said term; that he will not assign the said demised premises without leave of the lessor or his assigns, and that the lessor and his legal assigns may re-enter for default of thirty days in the payment of the rent reserved, or for breach of any of the covenants herein contained. The said Henry Exall further covenants for himself, his personal representatives and assigns, that he will at all times during the said term keep the buildings erected upon the demised premises insured for their
64 full value in a solvent insurance company at his own costs and charges, and that in the event that the said buildings shall be consumed by fire during the said term, that the insurance-money shall be expended in the erection of a building in all respects equal to the building so consumed by fire. And in the event that such insurance-money shall not suffice to erect such a building, then the said Exall covenants to expend such insurance-money in the erection of such a building on said premises as the said lessor or his legal assigns may designate or prescribe.

In witness whereof the parties hereto have hereunto set their hand and affixed their seals on the day and year first herein written as the date thereof.

W. GODDIN, [SEAL.]
Ex'or of S. P. Vial, dec'd.
HENRY EXALL. [SEAL.]

STATE OF VIRGINIA,
City of Richmond, to wit:

I, John C. Sinton, a notary public for the city aforesaid, in the State of Virginia, do certify that W. Goddin, ex'or of S. P. Vial, dec'd, and Henry Exall, whose names are signed to the foregoing writing, bearing date on the 2d May, 1865, have acknowledged the same before me in my city aforesaid.

Given under my hand this 13th day of June, 1867.

JOHN C. SINTON, *N. P.*

CITY OF RICHMOND, *to wit:*

In the office of the court of hustings for the said city, the 14th day of June, 1867—

This deed was presented, and with the certificate annexed, admitted to record at eleven o'clock a. m.

Teste:

R. O. HOWARD, *Clk.*

A copy. Teste:

BENJ. H. BERRY,
Clerk Chancery Court, City of Richmond.

EXHIBIT Q.

This deed, made this the twentieth day of December, 1872, between Wellington Goddin, executor of Seymour P. Vial, deceased, of the city of Richmond, of the first part, and Casper Wendlinger, of the said city, of the second part, witnesseth:

65 Whereas Seymour P. Vial, by his last will and testament, duly admitted to probate in Richmond hustings court on the 20th of May, 1861, did appoint the said Wellington Goddin his executor, and by the tenth clause of his will did authorize and empower his said ex'or, at his discretion, at any time that he might think proper, and upon such terms as he might deem most beneficial for his estate, to sell any portion of his unimproved real estate; and whereas the real estate, hereinafter described, at the time of the death of the testator, was improved by a handsome brick dwelling, but by the great fire of the 3d of April, 1865, the said brick dwelling was destroyed, so that the lot on which the dwelling then stood became unimproved, in the language of said will; and whereas the said lot, with the adjoining one fronting on Main street, was leased to Charles J. Meyer, the assignor of the said party of the second part, for the term of ten years from the 1st day of July, 1865; and whereas, by virtue of the powers conferred on the said executor by the tenth clause of the will aforesaid, he hath sold the lot hereinafter described to the said Wendlinger for the price of two thousand one hundred dollars, payable two years after date, with interest thereon at the rate of eight per cent. per annum, the said interest to be paid quarter-yearly on the first days of April, July, October, and January of each year, so long as the principal remains unpaid, secured by a trust-deed on said real estate; and the said C. Wendlinger, being now ready to comply with his part of said contract, desires a conveyance for said lot to be made to him:

Now, therefore, the said Wellington Goddin, executor aforesaid, for and in consideration of the premises, and of one dollar to him in hand paid, doth grant and convey with special warranty under the said Casper Wendlinger the following real estate, viz:

All that land lying and being in the city of Richmond, on the south side of Bank, between Ninth and Tenth streets, fronting twenty-one feet on said Bank street, running back at right angles within parallel lines seventy-five feet to the rear of the lot on which said Casper Wendlinger now resides, bounded on the east by the line of John Freeland's brick wall, on the west by the brick wall on the lot leased by said party of the first part for ten years from 1st July, 1865, to W. L. Montague, by deed duly recorded in Richmond hustings court, and being a part of the land described in the before-recited deed of lease from the said party of the first part to Charles J. Myers, assignor of the said party of the second part, and which is also duly recorded in Richmond hustings court, to which said deed of lease special reference is hereby made.

And whereas by virtue of this conveyance it is mutually understood and agreed by and between the said parties of the first and second parts that so much of the deed of lease before referred to as embraces the lot hereby conveyed and described therein as

66 the eastern tenement of the house known as the "Park House," is hereby cancelled and annulled, from and after the first day of January next; but that portion of said lease embracing the lot on

Main street shall remain in full force and virtue, as if this deed had never been made.

Witness the following signatures and seals:

W. GODDIN, [SEAL.]
Ex'or of S. P. Vial, deceased.
C. WENDLINGER. [SEAL.]

STATE OF VIRGINIA,
City of Richmond, to wit:

I, John C. Sinton, a notary public for the city aforesaid, in the State of Virginia, do certify that Wellington Goddin, executor of S. P. Vial, dec'd, and C. Wendlinger, whose names are signed to the foregoing writing, bearing date on the 20th day of December, 1872, have acknowledged the same before me in my city aforesaid.

Given under my hand this 31st day of December, 1872.

JOHN C. SINTON, *N. P.*

CITY OF RICHMOND, *to wit:*

In the office of the court of chancery for the said city the 31st day of December, 1872—

This deed was presented, and, with the certificate annexed, admitted to record at half past twelve o'clock p. m.

Teste:

BENJ. H. BERRY, *Clerk.*

A copy. Teste:

BENJ. H. BERRY, *Clk.*

Paper marked W, referred to in agreement of counsel.

Will of Seymour P. Vial, dated 21st April, 1855, admitted to probat' in hustings court 20th May, 1861, Will Book No. 20, page 646.

1. Directs all his real and personal property to be kept together by his ex'r during the *the* natural lives of his son, Peter Vial, and of his (my) sister, Rosa S. P. Wilkins (who was Vial), and of a free woman of color named Desiree or Kesiah Boubee, and during the life of the survivor of them, taxes, insurance, and repairs to be paid.

67 2nd. $600 per annum out of the net rents and profits aforesaid to be paid to said Kesiah Boubee, before anything else, during her life—she also to have during her life use of house and lot on Leigh street; if said house shall burn, and insurance thereon not enough to rebuild, the same to be rebuilt out of rents and profits of his estate.

3rd. Gives annuity of $300, during her life, to his sister, Rosa L. P. Wilkins, and use of house and lot on Byrd street, with like provision if house is burnt.

4th. Directs his ex'or to invest $2,000 out of the sales of unimproved real estate or rents and profits aforesaid, in the name of the ex'or, as trustee for testator's adopted daughter, Rosalie Vial, she to receive the interest until she is 21, and then to have principal.

5th. Gives Peter Vial use for life of house on Clay street, and $6,000 per annum for life out of rents and profits.

6' During the lives of Peter Vial, Rosa L. P. Wilkins, and Kesiah Boubee, leaves $200 per annum to each of the children of his late son, Thos. P. Vial, viz, Edward Powell Vial and Sarah Virginia Vial.

7th. Leaves *leaves* like legacy of $200 to each of the children of his brother, Claudius Vial.

8th. Like legacy of $200 to Octavia Vial, daughter of Peter Vial.

9th. Ex'or to hire out his faithful servant, Peter, and if he wishes to be emancipated, that is to be done.

10th. Gives ex'or discretion to sell his unimproved real estate and apply proceeds of interest, after investing the principal, to payment of legacies.

And upon the death of said Peter Vial, Rosa L. P. Wilkins, and Kesiah Boubee, and the survivors of them, all of his estate then remaining unsold shall be sold by his ex'or, and the proceeds divided, share and share alike, between the following persons, if then living, viz, Seymour P. Vial, Mary Octavia Vial, Wm. Robert Vial, and Sarah Virginia Vial, children of Peter Vial; Edward Powell Vial and Sarah Virginia Vial, children of Thomas P. Vial, and Susan A. E. Bonduvant (who was Vial), Mary Vial, and Claudius Seymour Powell Vial, children of Claudius Vial. If at the time of division any of these parties are dead, their issue to take share of parents; if no issue, such share to pass to and be equally divided amongst the survivors named in this clause.

20 May, 1861.—W. Goddin qualified as ex'or, without security.

68 EXHIBIT X.—*Agreed to be used subject to objection as legal evidence.*

Amount of insurance in force January, 1870, by policies issued prior to 3d April, 1865, in the names of the owners at that date, which had changed hands		$5,267,252 46
Amount of insurance in force January, 1870, on policies issued prior to 3d April, 1865, which had changed hands subsequent to 3d April, 1865		2,297,339 16
Amount of insurance in force Jan'y, 1870, on policies issued prior to 3d April, 1865		$7,564,591 62
Amount of insurance withdrawn to 1st January, 1870	$1,152,149 50	
Amount destroyed by fire, pulled down or surrendered, and superceded by new policies	2,581,260 08	
		3,733,409 58
Total insurance 1st Jan'y, '65		$11,298,001 20

Agreed facts.

In circuit court of the city of Richmond.

GRÆME'S EX'OR
vs.
THE MUTUAL ASSURANCE CO.

(1). Græme, ex'or of Græme, assignee of Marx & Fisher; and (2) Græme, ex. of G., ass. of Cullen; and (3) Græme, ex. of Græme on policy of Dec'r 31st, 1858 (covenant No. 1).

The following are agreed as facts in this case, to wit:

That on the 3rd day of April, 1865, Richmond City was evacuated by the Confederate army; that before the evacuation General Lee, the com-

mander-in-chief, issued an order to his subalterns, Gen'l Ewell and Maj. Carrington, provost marshal of the city, commanding them to burn all the tobacco in the city before the city was evacuated; that in obedience to that order they prepared all the tobacco to be burnt, taking the utmost care of which they were capable to guard against the extension of the flames from the tobacco to any other property; that on the morning of the day on which Richmond was evacuated, being a still morning, the tobacco in Shockoe warehouse, in obedience to the said order, was fired. After it was fired the wind rose and blew freshly from the southeast to
69 the northwest; that the buildings owned by John Græme were situated to the northwest, distant about three or four squares from the tobacco warehouse aforesaid, with a broad street, called Cary street, also intervening; that by force of the wind the fire was extended from the building in which the tobacco was, viz, the said Shockoe warehouse, until it reached and consumed the buildings of the plaintiff, which were insured by the defendant by the following policies of insurance [here insert them], upon which the premiums of insurance have been regularly paid up, and they became due prior to the fire for some time—seven or eight months—say November, 1865. After the fire there were no courts held in Richmond and no judicial or other legal proceedings had.

The foregoing facts are mutually agreed between the parties, and it is further agreed that either side, pl't'ff or def'ts, is at liberty to prove any other fact deemed material by them and pertinent to this or the other cases upon the trial of this cause; and it is further agreed that this agreement shall apply as well to this cause and the other two causes depending in this court as to the two causes depending in the chancery court of Richmond. The three cases in this court are styled as in the caption to this paper, and the two cases in the chancery court of Richmond are styled, respectively, Jas. E. Lipscomb, surving partner of Alvey & Lipscomb, vs. The Mutual Ass. Society, and Wellington Goddin, ex'or of Seymour P. Vial, deceased, vs. The Mutual Assurance Society.

(Signed) JAMES LYONS,
Att'y for Pl't'ff in each of the cases.
W. W. CRUMP,
JAMES NEESON,
Counsel for Def'ts in each of the cases.

JUNE 22D, '74.

The foregoing is a copy of a paper filed in the suit of Græme's ex'or vs. The Mutual Assurance Society of Va., lately pending in the circuit court of the city of Richmond.

Teste:

ALFRED SHEILD, *Cl'k.*

OCT. 19TH, 1877.

VIAL'S EX'OR
vs.
THE MUTUAL ASSURANCE SOCIETY OF VIRGINIA against fire on buildings.

In the chancery court of Richmond.

The replication of Wellington Goddin, executor of Seymour P. Vial, to the answer of the Mutual Assurance Society of Virginia against fire on buildings.

The said Wellington Goddin comes here and says that it is not true, as is alleged in the said answer, that the buildings belonging to the said Seymour P. Vial, in the bill mentioned, were set fire to and burned by the Government of the Confederate States, or by its agency, direction, and means, but were set fire to and burned accidently by a spark or sparks of fire blown by the wind from some other burning building, or buildings, which are the property of whom this respondent does not know; that it is not true that they were burnt as a war measure by any government or its agents. It is not true that they were burnt by or in consequence of any riot, or civil commotion, or by any invading army of a foreign enemy. It is not true, as in the said answer is alleged, that this respondent erected, or caused to be erected, other buildings upon the same land upon which the burnt buildings stood, and insured the same in the office of the defendant; and it is not true that upon such insurance he received from the def'ts a credit for the premium paid by Seymour P. Vial, or any part of it; and it is not true as alleged in the said answer, that he agreed for any consideration to release and surrender the claim which he, as executor of the said Vial, had, and still has, to recover of the def't the loss which the estate of the said Vial sustained by the burning of the said buildings; that he never surrendered the policies of insurance, or either of them, which the said def't society issued to the said Vial, but, on the contrary, this suit is founded upon them; that he never knew or believed, or was told by any one, that a credit for the said old premium to any one who might insure buildings erected after the fire upon the said ground would amount to, or be taken as a release or surrender of, or estoppel to demand the compensation due by the defendant to the estate of Seymour P. Vial, or his personal representative, for compensation for the loss and damage sustained by the destruction of his buildings by the fire aforesaid; that he never believed, and does not now believe, that he had lawful authority to make such release or surrender or estoppel, and never would have knowingly, directly or indirectly, have allowed such credit to have been given
71 if he had known, or believed, or even suspected that the effect of such credit would be to release or surrender the said claim, or to estop this repliant from demanding payment of it, and if the said defendant society gave such credit for the old premium with the knowledge, intent, or belief that it would estop this repliant, as the executor of Vial, from demanding of the defendant without communicating to this repliant such knowledge and intention, it practised a great fraud upon this repliant, and can take no benefit thereby. The said Wellington Goddin, executor as aforesaid, further says that in the spring or early summer of 1865, shortly after the great fire of the 3d April, when he was, as he is now, the executor of the last will and testament

of Seymour P. Vial, and was well known as such by John Rutherford, the principal agent of the Mutual Assurance Society, the def't in this cause, he called on the said Rutherford, in company with John Grame, to inquire, and did inquire, what arrangements the said society, or he for it, would make for the settlement of the claim against the defendant for losses sustained by the said Græme by the same fire which destroyed the property of the said Seymour P. Vial on the same day, and the said Rutherford told the said John Græme, in the presence and hearing of this respondent, that the said society would make no arrangement for the satisfaction of any claim for loss or damage by the said fire, because it considered the fire an act of war, for the consequences of which, or injuries occasioned by which, it did not consider itself responsible.

This respondent did not deem it necessary or proper to give any other notice to the said agent, to whom only could it be given, because he considered the said agent as having admitted full notice by his declaration aforesaid, and having waived any other or farther notice, and the society which he represented as having also acknowledged full notice, and waived any farther notice, because its determination avowed by its agent that it was under no liability for the loss by the fire necessarily admitted a knowledge of all the facts material to the formation of its conclusion, and farther notice, even the most technical, could neither aid or enlighten it.

W. GODDIN,
Ex'or of Seymour P. Vial, dec'd.

STATE OF VIRGINIA,
City of Richmond, to wit:

This day Wellington Goddin, executor of Seymour P. Vial, personally appeared before me, a notary public for the city of Richmond, and made oath that all the facts stated in the foregoing replication are true to the best of his knowledge and belief.

Given under my hand this 29th day of March, 1879.

JOHN T. GODDIN, *N. P.*

72 *Opinion of court, March, 1879.*

VIAL'S EX'OR
vs.
MUTUAL ASSURANCE SOCIETY, &C.

This case has been argued and submitted to the court on an agreed state of facts.

It was argued partly in writing and in part orally; the oral argument commencing on Monday, the 20th Jan'y, 1879, and continued between two and three days.

After this argument was over and the case was submitted, I noticed for the first time on reading the bill that Mr. Howard was one of the counsel of record; and while the case was in my hands and under consideration Mr. Howard informed me that he was counsel and desired to take part in this case. I informed counsel on both sides of his wish, and I think told him and counsel on both sides that I would hear him. This was, I think, early in February, 1879. Mr. Howard represented that he had other engagements which were pressing, and the court postponed the hearing of Mr. Howard's argument until Saturday, March 1, 1879.

On that day Mr. Howard appeared in court and objected to the agreed state of facts on which the case had been submitted by Mr. Lyons and Col. Gordon, who appeared as counsel for the plaintiff, Mr. Howard being also counsel for the same plaintiff.

The question is whether under these circumstances the status of the case as submitted can now be changed.

Mr. Lyons and Col. Gordon, as counsel for the plaintiff, insist upon submitting the case as it now stands, and as it now stands, and as I understand them, they assert that after having agreed the facts and argued and submitted the case on those facts, it would be a breach of faith with their opponents now to recede from that agreement. Mr. Howard on behalf of the same plaintiff claims that he as counsel was no party to the agreement and is not bound by it.

Without deciding whether Mr. Howard as counsel is or is not bound by it, I am of opinion that the plaintiff is bound by the agreed state of facts on which his case has been argued and submitted by Mr. Lyons and Col. Gordon, his counsel. Mr. Goddin, the ex'or of Vial, knew that his case had been matured for hearing—knew that it had been argued and submitted to the court for decision by Mess. Lyons & Gordon, for he was in court in person and at his request made a statement to the court to the effect that Mess. Lyons and Howard were his counsel; that Col. Gordon had been spoken to by Mr. Lyons (who is in bad health) to assist him. He did not then and has not since done any act or said one word to repudiate the action of Mess. Lyons and Gordon in agreeing to a state of facts, or in arguing his case upon them, or in submitting the case in its
73 present status to the court for decision; and I think that he must be deemed to have acquiesced in their course of action and management of his case. See Johnson vs. Gibbons, 27 Grat., 636, and case therein cited.

The question as to who is the leading or controling counsel in this case, I think, is not one for the court, and I decline to decide it. From the necessity of the case, the court must regard all counsel of record for a party in the suit as of equal authority. Each and every of such counsel must be regarded by the court as competent to bind his client by all acts which are within the scope of his powers as counsel. If in a case where there are two or more counsel for a party and they differ as to the management of the case and cannot agree among themselves, I think it is a question for their client, who is their principal, to determine who shall represent him. It is not a question for the court, for that would be for the court to decide for the principal which of two attorneys shall represent him. It disclaims such a power. The remedy of the principal is in his own hands, and a court will not undertake to disturb him in the exercise of his remedy, or free him from responsibility if he fails to exercise his remedy. So long as he permits an attorney to stand upon the record as his representative, he is bound by all such acts of the representative, as the principal (in this case the plaintiff) if in court might do himself. Herbert vs. Alexander, 2 Coll., 503. In this case if the agreement had been made by Goddin, the plaintiff himself, I suppose no one will question that he would be bound by his act; and so he must be bound by the act of Mr. Lyons, his attorney, for his (Mr. Lyon's) action in this case relates to the management of the case in regard to the evidence, and that is a question peculiarly within the line of the duty of an attorney at law; and so the agreement of the facts on which the case was submitted being a matter

within the scope of the attorney's authority must be binding upon the pl't'ff.

Mr. Goddin has never repudiated that action of Mr. Lyons, as he might have done if he had chosen to do so. I do not see, under such circumstances, how the objection or protest of Mr. Howard can have any effect. He is only co-counsel with Mr. Lyons. He has equal authority with Mr. Lyons; but he has not greater authority. His objection or protest cannot invalidate the acts of Mr. Lyons done within the scope of his authority as counsel. To give that effect to Mr. Howard's objection would enable an agent having only equal authority to repudiate the act of another agent of equal authority. This cannot be, because we have seen that it is the prerogative of the principal alone to repudiate the action of the agent if it be done within a reasonable time after knowledge of the act.

74 For these reasons I am of opinion that the case must stand as it now is. But the court will, under the circumstances, hear Mr. Howard as counsel for the plaintiff if he thinks proper to argue the case.

Decree of May 6th, 1879.

W. GODDIN, EXECUTOR OF S. P. VIAL, DECEASED, pl'tff, *against* MUTUAL ASSURANCE SOCIETY OF VIRGINIA, def't.	In chancery.

This cause, by consent of James Lyons, esq., and W. W. Gordon, esq., appearing as counsel for the plaintiff, and James Neeson, esq., and W. W. Crump, esq., appearing as counsel for the defendant, came on to be heard on the 20th day of January, 1879, upon the original and amended bills of the complainant (duly attested copies whereof having been substituted and used in place of said bills, the same having been lost), the answer of the defendant and the exhibits filed therewith, general replication thereto, and upon the written agreement of counsel of the date of December 18th, 1878 (as to certain evidence, papers, and facts to be considered in the cause), and endorsed "Agreement of counsel," and was argued by counsel and submitted to the court.

Whereupon, the court having held the said cause under advisement, and now having maturely considered the same and being of opinion (for reasons stated in a written opinion marked "Opinion of court, April, 1879," which is filed with the record and made part of this decree, but not to be copied in the order-book) that the defendant is not responsible to the complainant for the claim set up by him in his said bills, and should therefore not be required to make good the losses sustained by said complainant alleged and stated in his said bills, doth adjudge, order, and decree that the said bills be dismissed, and that the said W. Goddin, executor of S. P. Vial, do, out of the assetts of his testator in his hands to be administered, pay to the said defendant its costs by it expended in this suit.

Opinion of court, April, 1879.

It is admitted in the pleadings in this case that the property of the testator, Vial, was insured by the defendant—subject to its constitution, rules, and regulations.

It is also admitted that while the policies of insurance of the defendant were in full force, three tenements of the plaintiff's testator in the proceedings mentioned were burned, consumed, and destroyed on the 3rd day of April, 1865.

75 But the defendant insists that the loss or destruction sustained by the plaintiff testator, whatever may have been its extent upon the property set out in the pleadings, imposes no obligation on the said defendant.

The defendant claims and insists among other things that said loss or damage was excluded and excepted from the liability of the society for the same by section 12 of chapter 10 of the constitution, rules, and regulations of the society.

That section is in these words:

"Sec. 12. No policy whatever which may be issued shall bind the society to answer for losses which may result from riots, civil commotions or insurrections, from the invasion of a foreign enemy, from hurricanes or earthquakes, or from the direct or indirect agency of the proprietor of the building which may be burnt."

And the defendant claims that under the circumstances, and according to the facts attending the destruction of said property, the society was exempt from liability by reason of the express terms of the contract, and especially by reason of the exception against fire which may result from foreign invasion, civil commotion, or insurrection.

The facts and circumstances above alluded to are set forth in a paper marked "Agreement of counsel" and the several papers and documents therein referred to.

Without going into a detailed statement of the facts developed in those papers, it is sufficient at present to state that by an act of the Congress of the Confederate States approved March 17th, 1862, the military authorities of the Confederate army were authorized and directed to destroy cotton, tobacco, military and naval stores, &c., which might aid the enemy in the prosecution of the war, when necessary to prevent the same or any part thereof from falling into the hands of the enemy.

That at the time of the evacuation of Richmond by the Confederate forces, namely, on the 3d of April, 1865, a large quantity of tobacco was stored in warehouses in that city. That the Confederate military authorities then in command in Richmond, in obedience to orders received from the commander-in-chief of the Confederate forces, about or a little before daybreak of Monday, the 3rd day of April, 1865, set fire to the tobacco in Shockoe's and Von Groning's warehouses. The night was remarkably still at the time the fire was applied, but very soon after the warehouses were fired the wind rose from the southeast and in a short time quite a breeze was blowing from that direction.

The flames began at the southest portion of the city and spread rapidly.

That during the night the authorities of the city of Richmond, accompanied by Judges Meredith and Lyons, went out to meet the Federal troops, and about two miles from the corporation line met them, and made a formal surrender of the city.

76 And Mr. James Scott, who was then one of the city officials, who went out to make the surrender, says that on returning towards the city, and when about a mile and a half distant, upon an elevated point of the road, and about sunrise, he saw that the tobacco warehouses in the city were on fire.

The fire continued to spread until it was checked about one o'clock

p. m. of Monday, principally by the exertions of the division of the United States Army under the command of General Wetzel, which first entered the city.

In this fire the three tenements of the plaintiff's testator, above referred to, were consumed.

The question is, whether this loss occurred by means of a risk excepted in the policy; or, to state it more definitely and more exactly, with the contention of the defendant, as set forth in its answer, whether the society "was exempt from liability by reason of the express terms of the contract, and especially by reason of the exception against fire, which may result from foreign invasion, civil commotion or insurrection."

I. Did the loss in this case result "from the invasion of a foreign enemy?"

The supreme court of appeals in this State has never directly decided what was the character of the governments set up by the eleven States which seceded from the United States.

That court has never decided that the Government of the Confederate States was not a de jure government. No case seems as yet to have arisen in which it was necessary, in their judgment, to determine whether it was or was not a de jure government.

But in all expressions of opinion touching that general subject it seems to have been carefully left an open and undecided question. In Walker vs. Christian, 21 Gratt., 300, they say "it is immaterial to enquire whether the said government (the Confederate Government) was one de jure or de facto only." And then say, among other things: "It is a great mistake to regard this government as a mere temporary outbreak or insurrection." And then Mr. Justice Grier is cited as saying in Prize Cases, 2 Black, 435, 673:

"Hence in organizing this rebellion they have acted as States claiming to be sovereign over all persons and property within their respective limits, and asserting a right to absolve their citizens from their allegiance to the Federal Government."

In short, the reasoning of the court of appeals would seem to be that it was an organization or confederacy of State governments arrayed against the Government of the United States, and not a mere insurrection, and therefore a war of government against government; and then at page 301, the court goes on to say:

"The Confederate Government was perfectly organized, and exercised supreme power over the vast territory within its limits during the four years of its existence.

77 "Its lawful authority was universally acknowledged by all persons who were under its control, and most of them not only professed to be, but actually were, devoted to it, and anxious for its success."

In Newton, &c., vs. Bushong, &c., 22 Gratt., 641, Staples, J., speaking for the whole court, says:

"In considering this case, I have been content to concede that the Government of the Confederate States was only a government de facto.

"Whether it was or not during its existence something more is a proposition in regard to which statesmen and jurists will differ so long as a trace of the struggle remains; so long as the fundamental principles of the government excite discussion among men.

"The decision of that question is not rendered necessary in any aspect of this case. Should it ever arise, I trust this court will meet it with the gravity and deliberation its importance demands."

And in Reachman, &c., vs. Lightner, &c., 24 Gratt., 26, the court say: "That the Government of the Confederate States was at least a de facto government of the highest order, if not indeed a de jure government, would seem to be a truth too self-evident to be denied."

Following the example of the supreme court of appeals of this State, and abstaining from deciding whether that government was one de jure, or merely de facto, and conceding for the purposes of this case that it was only de facto, I proceed to enquire what is the peril against which the society refused to insure, when it declared that no policy issued by it should bind it to answer for losses which might result from the invasion of a foreign enemy? It is evident, I think, that a fair interpretation of those words means that it refused to insure against the perils of an open public war, the perils of a war in which hostile armies confront each other, in which the laws are silent, and in which property is liable to be captured and destroyed, and buildings and towns to be burnt.

Now, in the war which existed between the United States and the Confederate States on the 3rd April, 1865, this peril existed in all its fullness.

There can be no question that the territory over which the power of the Confederate Government was recognized as supreme during its existence was invaded by armies hostile to it. That the territory thus invaded was regarded by the Government of the United States and treated by the military authorities of the United States as enemies' territory—Thorington v. Smith, 8th Wall., 11—because claimed and held in possession by an organized hostile and belligerent power—Prize Cases, 2 Black, 673–4. Belligerent rights were conceded to the Government of the Confederate States, such as the treatment of captives both on land and sea as prisoners of war, the exchange of prisoners, their vessels captured recognized as prizes of war and dealt
78 with accordingly; their property seized on land referred to the judicial tribunals for adjudication; their ports blockaded; and the blockade maintained by a suitable force and duly notified to neutral powers, the same as in open and public war—Mauran v. Ins. Co., 6 Wall., 1. In short, the governments of the United States and of the Confederate States, while the latter existed, must necessarily be considered as two separate bodies, two distinct societies. Having no common superior to judge between them, they stood in precisely the same predicament as two nations who engage in a contest and have recourse to arms. Prize Cases, supra., p. 667.

The war between the United States and the Confederate States was conducted precisely as if each had been an independent nation. And the peril against which the society refused to insure or to take any risk was precisely the same as it would have been had the war waged between two distinct nations foreign to each other. If, therefore, the parties to this war were properly regarded as on the same footing as if they were two foreign nations in all the respects above indicated, they must be regarded as foreign to each other in respect to this exception in this policy. For it is difficult to see how the invasion of Confederate territory can be properly regarded as made by an enemy not foreign so far as regards this exception, and by a foreign enemy for all other purposes. This society had its principal office in Richmond, the capital of the Confederate Government. For four years it had conducted its business while that government bore the same relation to this State that the U. S. Government had before the war. It had sub-

mitted to the rule of the Confederate Government, nay, its obedience to the authority of that government in civil and local matters, as not only a necessity, but a duty. Thorington v. Smith,, supra., p. 11.

Therefore, while the defendant was thus subjected to the authority of the Confederate Government, the exception against foreign enemies applied to enemies foreign to the Confederate Government, which then dominated and ruled over the defendant, and not to enemies foreign to the Government of the United States, for in the condition in which the defendant then was, the term "foreign enemy" could apply to no other than the Confederate Government.

I am therefore of opinion that the forces of the United States which took possession of the city of Richmond on the morning of the 3d of April, 1865, were foreign enemies within the meaning of this exception.

II. But if I am wrong in this conclusion, and if the supreme court of appeals is also wrong in treating the Confederate Government as a government de facto of the highest order, then it must follow, according to the views on this subject entertained by the Supreme Court of the United States, that those Federal troops which entered Richmond on the morning of the 3d of April, 1865, were military forces called out under the constitution to suppress insurrection against the Government of the United States, and were therefore domestic, and in no sense foreign forces.

79 See the Prize Cases, supra., pp. 668, 670; Williams vs. Bruffy, 96, S. C. R. (6 Otto), 185 et seq. In the latter case the Supreme Court of the United States say that the Confederate States Government, whilst it existed, was regarded "as simply the military representative of the insurrection against the authority of the United States." See also Thorington vs. Smith, supra, p. 9.

If this view prevails, then if must follow that the case comes within the exception against insurrection found in the policy of the defendant.

III. But it is argued by the plaintiff's counsel that although either one of the foregoing conclusions may be sound and correct, yet neither exception is applicable to the present case, because, as they contend, the burning of the buildings of the plaintiff's testator was not the result either of invasion or of insurrection, because they say the Federal army had no part in firing the tobacco or in spreading the flames by which the property in question was destroyed, and because in fact the tobacco was fired by the Confederate forces by order of the Confederate Government to prevent it from falling into the hands of the enemy, and with no intention to burn the city of Richmond, but on the contrary using every precaution to prevent the spread of the flames, and because the fire was extended to the buildings in question by force of the wind, which suddenly sprung up after the firing of the tobacco, and because, as they contend, the approach of the Federal army to the city of Richmond on the morning of the 3d of April, 1865, was not the proximate cause of the loss, but a new force or power intervened of itself sufficient to stand as the cause of the misfortune, viz, the wind, which suddenly arose, and therefore the approach of the Federal army must be considered as too remote to be held, in a legal sense, as the cause of the loss.

I do not concur in this view. I think the case of Insurance Co. vs. Boon, 98 S. C. R. (5 Otto), 117, a case very similar to this, settles the question raised by the plaintiff's counsel adversely to them.

In that case it appears that the city of Glasgow, in Missouri, was

a military post and a place of deposit for military stores of the United States.

On the 15th October, 1864, it was attacked by the Confederates. When it became apparent to the Federal commander that it could not be successfully defended, he ordered the military stores to be destroyed to prevent them from falling into the possession of the Confederate forces. These stores were in the city hall and that building was fired in order to destroy them. The fire spread without other agency or instrumentality to the adjacent building, and through two other intermediate buildings to the store of the plaintiff, destroying the same with certain goods insured in the Ætna Fire Ins. Co., of Hartford. The battle continued during the time and until after the fire had con-
80 sumed the goods. No surrender had taken place, nor had the Confederate forces obtained possession of or entered the city.

The exception in the policy was against any loss or damage by fire which may happen by means of any invasion, insurrection, riot, or civil commotion, or of any military or usurped power, &c., and the court held that the fire which destroyed the plaintiff's property took place by means of an invasion or military or usurped power, and that it was excepted from the risk undertaken by the insurers.

The rule laid down by the court in that case, as one vindicated by a careful consideration of the authorities, was that "the proximate cause is the efficient cause, the one that necessarily sets the other causes in operation. The causes that are merely incidental or instruments of a superior or controlling agency are not the proximate causes and the responsible ones, though they may be nearer in time to the result. It is only when the causes are independent of each other that the nearest is of course to be charged with the disaster."

Now in this case it seems quite clear to my mind that the predominating and operative cause of the fire was the approach of the Federal troops to the city of Richmond—the invasion of the enemy. It was the efficient predominating peril that necessarily set all the other causes in operation. The authorities of the city of Richmond had left to surrender it. It was actually surrendered about the time the tobacco was fired by the Confederates. The Federal forces were in close proximity to the city, with an open way and an unopposed march to it. They were so close that they entered the city while the flames were yet raging and engaged actively in the work of subduing them. There is no question that the tobacco was fired to prevent its falling into their possession, and that their presence before the city as above stated was the cause of its being fired. From the tobacco warehouses the flames spread from building to building until they reached those of the plaintiff's testator and consumed them.

The act of firing the tobacco, the spread of the flames from building to building until they reached and consumed the buildings of the plaintiff's testator, were a chain of continuous events brought into being by the invasion of the Federal forces. Those events were the consequence of that invasion and near approach to the city by those forces, and not new and independent causes of the loss. I do not think that the wind which sprang up after the tobacco was fired was such a new force or power which had intervened as to have been of itself sufficient to stand as the cause of the misfortune, and that must be the case to make the invasion too remote as a cause. Insurance Co. vs. Tweed, 7 Wall., 52. Surely the wind of itself was not sufficient to stand as the cause of the disaster in this case, for without the existence of the fire, which was
81 burning when it sprang up, the wind would have been harm-

less. If the proposition that the wind which sprang up during the fire was the sufficient proximate cause of it, then it would follow that if this insurance society had insured a hundred buildings in Richmond, and the hand of an invading foreign enemy had applied the torch to one of them, that building would have been within the exemption, because the loss in that case would have resulted directly from invasion by a foreign enemy, but if the wind springing up after the fire was kindled drove the flames in the direction of the other ninety-nine, and they were consumed, they would not have been within the exemption, because, according to the theory of the plaintiff, the wind was the proximate cause, and not the hand of the invader that kindled it, although the same fire spread continuously from building to building until the whole were consumed. I do not think this proposition can be maintained. In such case it seems to me to be clear that the predominating and operative cause of the fire would have been the firing of the first house by the invader. In the case of Insurance Co. vs. Tweed, supra, the very case of invasion is put by the court by way of illustration. If, says the court in that case, the fire had taken place by means of invasion, riot, &c., and by either of these means the Marshall warehouse had been first fired, and the fire had extended, as we have shown it did, to the Alabama warehouse (and I will add, as it is shown in this case to have extended), would the insurance company have been liable?

Could it be held as necessary to exemption that the persons engaged in riot or invasion must have actually placed the torch to the building insured, and that in such case, if half the town had been burned down, the company would have been liable for all the buildings insured except the one first fired? Or if a hurricane or earthquake had started the fire, is the exemption limited in the same manner? And the court answers these interrogatories by saying these propositions cannot be sustained.

I concur in these views as peculiarly applicable to this case, and therefore decide that the Mutual Assurance Society is not liable to the plaintiff, and that the plaintiff's bill must be dismissed with costs.

Let decree go accordingly.

82 *Decree of May 8th*, 1879.

W. GODDIN, EXECUTOR OF S. P. VIAL, deceased, pl'tff,
against
MUTUAL ASSURANCE SOCIETY OF VIRGINIA, def't. } In chancery.

This cause, which, as stated in a former decree, came on to be heard on the 20th day of January, 1879, and was then argued and submitted to the court for its decision, was decided by the court at the commencement of the April term, 1879, and its decision embodied in a written opinion was then formally announced in open court. Prior to the announcement of that decision, and while the case was under consideration by the court, namely, on Saturday the 1st day of March, 1879, John Howard, esq'r, one of the counsel for the plaintiff, appeared in court and objected to the agreed state of facts on which the case had been submitted by James Lyons, esq'r, and W. W. Gordon, esq'r, who had also appeared as counsel for the plaintiff. But the court, for reasons set forth in writing and marked "Note of c't, M'ch, 1879," and hereby

made a part of this order (though not to be copied in the order-book), overruled the objection of the said John Howard, esq., and proceeded to consider and decide the said cause as it had been submitted in January, 1879.

And thereupon the said John Howard, esq., on Monday the 5th day of May, 1879, after the written opinions of March, 1879, and April, 1879, respectively, had been announced, but before any decree had been entered in conformity with the opinion of April, 1879, appeared in court and asked leave to file a petition of the plaintiff, with the depositions and documents therein referred to, and moved the court, before entering any decree in the cause, to read and consider said petition and accompanying documents; to hear argument of counsel thereon as upon an original hearing or a rehearing of the cause.

The court has so far complied with the request of the plaintiff as indicated by John Howard, esq., one of his counsel, as to read and consider the said petition and accompanying papers.

And on consideration the court adheres to the views expressed in its opinion of March, 1879; and being of opinion that there is nothing in the said petition and accompanying papers to change its opinion on the merits of the case; and being further of opinion that it would be a hazardous innovation upon the practice of the court to permit a party to amend his case in the interval between the announcement of the decision of the court and the entering of the decree in the order-book,

doth adjudge, order, and decree that said motion be and the same
83 is hereby overruled. But the court will, nevertheless, permit said petition and accompanying papers to be filed, not as legitimately forming a part of the record in this case, but to enable the action of this court in the premises to be reviewed in the event that any party in interest may desire to resort to the appellate court for that purpose.

A true copy of so much of the record as ordered by plaintiff.

Teste:

BENJ. H. BERRY, *Clerk.*

Fee for copies, $32.50, paid by W. Goddin, esq'r, ex'or of S. P. Vial, dec'd.

A copy. Teste:

GEO. K. TAYLOR, *C. C.*

84 *Addition to record.*

S. P. VIAL'S EX'OR,
vs.
THE MUTUAL ASSURANCE SOCIETY AGAINST Fire on Buildings, of the State of Virginia.

To the supreme court of appeals of Virginia:

By way of amendment and supplement to the petition for appeal heretofore filed in the above-entitled cause, your petitioner, Wellington Goddin, executor of Seymour P. Vial, respectfully states that, as he is advised and believes, an important part of the record in the court below has not been copied and presented to this honorable court; and your petitioner begs respectfully to suggest such diminution of the record, and to exhibit herewith the omitted part of said record, and he prays that the same may be printed and used as an integral part of the case, on the merits, to be decided by this honorable court.

It will be seen that James Lyons and John Howard were your petitioner's original and only counsel; and on pages 50, 51 of the addition to the record will be seen the contract under which they have prosecuted this suit in behalf of your petitioner; which contract is a joint obligation under seal, by which the said Lyons and Howard bind themselves to prosecute said suit until its final determination, and by which your petitioner binds himself that for their compensation they shall receive one-third of all that may be recovered in the said suit, and that your petitioner will pay all clerk's and sheriff's fees and printer's bills. Under this contract, the said counsel acted jointly and harmoniously from its institution, in 1870, to January, 1879. Efforts had been made previous to that time by Messrs. W. W. Crump and James Neeson, for the defendant, and the said John Howard and W. W. Gordon (who in consequence of the great age and infirmities of Mr. Lyons represented him in the matter), to make an agreement as to the facts of the case, or to agree a case; and the said counsel had several meetings for that purpose, but had been unable to settle upon any agreement.

In this condition of things, the said counsel for the defendant and Mr. Lyons, and Mr. Gordon acting for and with him, came together, and without notice or intimation of any kind to Mr. Howard, entered into and signed the "agreement of counsel," to be found on pages 49, 50 of the record, and argued and submitted the so-called case to the court for its decision. Some time after this was done, Mr. Howard heard of the matter, and immediately brought the subject to the attention of the court. On reading the said papers, he objected to and protested in open court against the said action, and endorsed the following upon the said "agreement:" "This so-called agreement was signed and the case submitted to the court without notice to me, and I never saw it until it was handed to me by the court with the other papers in the cause. It does not, in my judgment, do the plaintiff justice, and, as one of the original counsel in the cause, I respectfully object to it, and enter this my protest against it; and I ask that the case may be regularly matured for hearing before it is heard. John Howard. March the 1st, 1879." See page 56, addition to the record.

And your petitioner thereupon appeared in open court, and read and exhibited to the court the said contract, above mentioned, between his said counsel and himself, and, declining to decide between his counsel, left the whole matter for the decision of the court, upon the terms and conditions of the said contract. See your petitioner's deposition, pages 33, 34, 35, 36 of the addition to the record.

Your petitioner felt that he had neither the right nor the power to repudiate the authority and rights either of Mr. Lyons or of Mr. Howard. For they were both equal and joint under the said contract, which was in writing and under seal, and spoke for itself. Nevertheless, the court, while declining to decide anything in respect to said contract or to decide what were your petitioner's rights and duties and the rights and duties of the respective counsel thereunder, held that your petitioner was bound by the agreement which the defendant's counsel had made with Mr. Lyons and Mr. Gordon (who assisted him) without notice to and in exclusion of Mr. Howard.

This, your petitioner is advised, was error. In Graeme v. Cullen, 23 Gratt., pages 275, 276, this honorable court said: "The law in regard to the power of one, of two or more trustees named in the instrument creating the trust, to execute the trust severally is very plain, and is familiar to us all. Where two or more persons are authorized to execute a trust or power jointly, of course they are not authorized to exe-

cute it severally, unless such authority be also given by the instrument creating the trust or power. That instrument being the only source of the authority, of course there can be no authority which does not flow from that source. Lewin on Trusts, 266, Marg.; 1 Lom. Dig. 249. A trust or power given to two or more is joint only, unless words be added making it several also." And see Story on Agency, § 42 (2), ed. 1863. "Having jointly undertaken the business of the partner-
86 ship," said the Supreme Court of the United States in a case between lawyers, "all the parties were under obligation to conduct it to the end. This duty they owed to the clients and to each other." Denver v. Roane, 99 U. S. R. (9Oth), 358. Of course neither joint contractor had the right to prevent the other from rendering services in the case, nor to deprive their client (your petitioner) of those services.

This petitioner himself, under the circumstances, could not have ejected Mr. Howard from the suit; for, under the terms of his said contract with this petitioner, Mr. Howard, by virtue of his professional skill, learning, and labor, which had been faithfully bestowed upon the suit from its institution to that time, had acquired a vested interest in and lien on the subject of litigation, and was alike entitled to render such further services in its preparation and prosecution as might, in his judgment, be necessary or proper for its proper hearing and its final success. See Wylie v. Cox, 15 Howard, 415, 420; McPherson v. Cox, 96 U. S. R. (6 Otto), 405.

And much less could the opposite counsel and the associate counsel of Mr. Howard (Mr. Lyons*) legally unite to remove him from the cause, or, which is equivalent to a removal and ejection, ignore him in its conduct and prosecution, and that in the most important matters of preparing the case for hearing and of arguing it at the hearing. The defendant and his counsel had full notice of Mr. Howard's employment in the case and of the objection made by him to the hearing of the case as soon as the matter was brought to his attention; and the honorable court below had the matter promptly brought to its attention before it undertook to decide the case upon the said agreement of counsel. Your petitioner, it is submitted, had rights in the matter which could not be ignored. He had the right to the services of both his said counsel; and if, as it turned out, they did not agree as to the case proposed to be submitted by counsel to the court, there was nothing else to be done but require the parties to mature the cause in the manner prescribed by law, which Mr. Howard respectfully asked the court to do. That is the legal, usual, and necessary way to mature a cause; and unless there be a valid agreement between parties competent to contract for its submission otherwise upon an agreed state of facts, your petitioner is advised that the court has neither the right nor the power to hear and decide the case. It is submitted that, under these circumstances, it was error in the said court to proceed to consider and decide the case. Acting upon the view that neither your petitioner nor himself was bound by the said ex parte "agreement of counsel," Mr. Howard promptly gave notice that he would proceed to mature the cause according to law, and did so, as this amended record will show.

Your petitioner respectfully prays that the testimony and exhibits therein filed may be considered by this honorable court in the
87 manner suggested in said petition filed in the court below; page 1 of the addition to the record.

*Mr. Gordon was only a substitute and assistant of Mr. Lyons.

The honorable court below did, in fact, consider the said testimony and exhibits, and was "of opinion that there was nothing in said petition and accompanying papers to change its opinion on the merits of the case." (Page 82 of the record.)

The honorable court was "further of opinion that it would be a hazardous innovation upon the practice of the court to permit a party to amend his case in the interval between the announcement and the entering of the decree in the order-book." Page 82 of record.

But it seems to have been forgotten that if the foregoing views be correct there was in reality no case before the court for decision until said depositions and documents had been filed; that it had been announced in open court by the counsel who filed them that, with all respect to the court, he should disregard the said so-called agreement of counsel and proceed to mature the cause in the usual and regular manner; that he did thereafter give legal notice to the defendant company of the time and place of taking depositions, and proceeded to take them duly at the appointed time and place; that they were all taken before any announcement of the said opinion of the court of April, 1879, though not filed until after its announcement; that of said documentary evidence, consisting of copies of the will of the testator and of the three cases referred to in the proceedings, no copies had, therefore, been filed, though of the utmost importance to a clear understanding of the relations of your petitioner to the estate of said S. P. Vial and to the defendant company in connection with the defence of estoppel, and though copies of the said papers were apparently intended by said so-called "agreement" to be filed; and that the honorable court, without waiting for said additional testimony, which it well knew was in course of preparation, proceeded to announce its said opinion upon the merits when the cause was not matured and not ready for a hearing. These important facts seem to have been forgotten by the honorable court.

And it seems also to have been forgotten that the sanctioning of such a proceeding (as the court did sanction) by part of the counsel in a case, in exclusion of and without notice to others equally entitled and equally bound in legal duty to act, to consult and be consulted in its proposition and to be heard in its argument, would, indeed, be a "hazardous innovation" that would lead to most disorderly and disastrous results, and destroy the fair and regular administration of justice.

But these are facts and considerations which will be remembered and weighed by this learned and upright tribunal, and there can be no apprehension as to the judgment it will render upon them. The honorable court below even went so far as to refuse all inquiry, as prayed, into the facts and circumstances attending the execution of said
88 co-called "agreement of counsel," and denied in substance all the prayers of your petitioner, and those of Mr. Howard's petition. What is to become of the profession, and of courts of justice, if the "hazardous innovation" sanctioned by the honorable court is to be established as admissible practice and the settled law of the land?

Your petitioner prays that the said rulings and decrees of the honorable court below may be reviewed and reversed, and a decree entered in this honorable court for the debt due to your petitioner, with interest from the said 3rd day of April, 1865; and he will ever pray, &c.

WELLINGTON GODDIN,
Executor of S. P. Vial, by Counsel.

FEB. 19, 1880.

I am, respectfully, of opinion that the said rulings and decrees complained of, the said original and amended and supplemental petitions for appeal, should be reviewed and reversed.

JOHN HOWARD.
Counsel practising in the Supreme Court of Appeals.

FEB. 19, 1880.

VIRGINIA:

In the chancery court of the city of Richmond.

Among the records and proceeding in this court are the following, viz:

W. GODDIN, EXECUTOR OF S. P. VIAL, DEC'D, plaintiff,
against
MUTUAL ASSURANCE SOCIETY OF VIRGINIA, defendant.

Petition of plaintiff.

In the chancery court of the city of Richmond.

WELLINGTON GODDIN, EX'OR OF S. P. VIAL,
vs.
THE MUTUAL ASSURANCE SOCIETY AGAINST Fire on Buildings, of the State of Virginia.

The petition of Wellington Goddin, executor of S. P. Vial, plaintiff, in the above-entitled suit, respectfully states that he presents
89 herewith certain depositions taken, upon notice to the defendant, in the said suit, namely, the deposition of F. Davidson, H. S. Wood, Bettie Wood, John A. Meredith, Wellington Goddin, executor of S. P. Vial, and certain documents referred to therein and made part thereof, and also the exhibits accompanying this petition, marked respectively Nos. 1, 2, 3, 4, 5, 6, 7 and 8, as parts hereof, which your petitioner begs may be received, filed, and considered by this honorable court in the determination of the rights involved in this cause.

Your petitioner specially refers to his own said deposition given in the case, and begs leave to repeat and reaffirm the statements therein contained as if copied and incorporated herein. The written contract between his counsel, Messrs. Lyons and J. Howard, is therein referred to and made a part of his deposition; and your petitioner now, as he has heretofore done, refers to and adopts that contract as the only and true contract between himself and his said counsel, fixing, governing, and determining the respective rights, duties, and powers of the parties thereto; and your petitioner has never intentionally done anything to change, alter, or affect the said *the said* written contract, if indeed such action could be otherwise than void on his part, without the joint consent of his said counsel.

Your petitioner respectfully states, that he has never undertaken to decide that Mr. Lyons, one of his said joint counsel, should alone control the conduct of the case, with power to agree to a statement of facts as the facts of the case, in exclusion of and without notice to his co-equal counsel, Mr. Howard, and that the court should accept such agree-

ment of facts as the basis of its decision against the protest of Mr. Howard made in open court. Indeed your petitioner never undertook or attempted to decide anything in the premises, but, on the contrary, when called upon, as he was, by the court to decide which one of the said counsel, if either, should exclusively control the conduct of the case in his behalf, your petitioner respectfully referred the court to the said written contract, which was then produced, as showing what were the rights and relations of the said counsel as to your petitioner and as to each other, and himself respectfully declined to construe said contract or to express any opinion as to its legal effect, such questions being, as your petitioner supposed, properly matters for the judicial determination of the court. It was a case of unusual magnitude, difficulty, and importance; and while it involved large interests of the testator's estate, the said counsel employed had also had, by virtue of said contract, large interests and corresponding rights involved in the subject of the suit, their compensation being a contingent fee of one-third of the recovery, and constituting, as claimed, a specific lien on or vested interest in the fund.

In submitting to the court the said contract, as your petitioner
90 did, with the remark that it spoke for itself, and that your petitioner could not undertake to decide what were the rights of the parties thereto, your petitioner considered that he had done his full duty under the circumstances; and he particularly and distinctly refrained from deciding or attempting to decide anything in the matter then pending, but referred the whole matter to the court under said contract.

Mr. Howard stated in open court that the said alleged "agreement of counsel" had been entered into and the case argued and submitted to the court without any notice to him or knowledge on his part, although he was and had been of counsel of record for the plaintiff from the institution of the suit to that time, and had taken a principal part in drawing the pleadings and in endeavouring to mature the cause by agreement of facts with defendant's counsel—facts as well known to the defendant's counsel as to Mr. Lyons; that in his, the said Howard's, best judgment, the said alleged "agreement of counsel" upon which the case had been attempted to be submitted to the court left out and excluded important papers and facts, and that it was unjust to the plaintiff, and he protested against being accepted and acted on as a statement of the real facts in the case; and contending that the case was not ready for a hearing, and declining to argue it, he respectfully announced that he should proceed to have the cause matured in the regular mode as provided by law, and should ignore and disregard the alleged "agreement of counsel" as a mere nullity. Mr. Howard, as he now states to your petitioner, has proceeded to mature the cause for the plaintiff, as he announced in open court that he would do; and the said depositions and exhibits herewith presented are now respectfully offered to the court for its consideration before entering any decree on the merits, the said depositions and exhibits to be considered either together with or without said "agreement of counsel" and the papers therein referred to or not, as may be deemed by the court proper under all the circumstances of the case. The "agreed facts" and papers filed in the case of John Graeme's ex'ors vs. The Mutual Ass. So. of Va., in the circuit court of the city, are conceded by your petitioner to be properly in this case.

Acting in a responsible fiduciary capacity, and wishing only to discharge his legal duty in the premises, and fully to protect the interests

of his testator's estate, and designing to do equal and exact justice between his counsel, and without designing to take the part of either against the other, your petitioner has deemed it right to bring before the court the above facts in connection with the said depositions, documents, and exhibits, which he is advised and believes present much important and material evidence directly bearing upon and successfully establishing his case; and he prays that the same may be read and considered by the court before entering any decree in the cause,
91 and that argument of counsel may be duly heard thereon as upon an original hearing or a rehearing of the cause or otherwise, as may be most in accordance with right, practice, and the justice of the case; that said written contract between your petitioner and his said counsel, Messrs. Lyons and Howard, bearing date the date of , 1878, a copy of which is filed with the depositions aforesaid, may be accepted and considered by the court as the only and true contract between the parties thereto in respect to the subject of this suit, and that it may be judicially construed as to the respective rights and authority of the said counsel thereunder touching the exclusive control of the case; and in connection with the validity or invalidity of said agreement of counsel under the circumstances alleged, that, if deemed necessary, the court may direct an iquiry to be had before one of its commissioners as to the circumstances attending the signing of the said "agreement of counsel" by Mr. Lyons and the defendant's counsel, and the submitting of the case to the court upon the same, and upon argument in exclusion of and without notice to Mr. Howard; that the said defendant, and also, if deemed necessary and proper, the said James Lyons and John Howard may be made parties hereto; that full justice may be done to your petitioner upon this his petition as upon a regular amended and supplemented bill, filed and proceeded upon in the most formal manner; that the defendant company may be required to pay the debt hereinbefore claimed by the original and amended bills in this cause to be due to the estate of the said Seymour P. Vial; and that general and all proper relief may be granted in the premises; and your petitioner will ever pray, &c.

G. GODDIN,
Ex'r of S. P. Vial, dec'd.

MAY 5, 1879.

Exhibit No. 1 with petition.—Will of S. P. Vial.

I, Seymour P. Vial, of the city of Richmond, do make, ordain, publish, and declare the following as for my last will and testament; that is to say:

First. It is my will and desire, and I hereby direct, that all the property, real and personal, of every description of which I may die seized and possessed, and to which I may hereafter have title, shall, except as hereinafter directed, be kept together by my executor, hereinafter to be named, for and during the natural lives of my son, Peter Vial, of my sister Rosa L. P. Wilkins, who was Rosa L. P. Vial, and of a free woman of color named Desiree or Kesiah Boubee, and during the life of the survivor of them; and that out of the rents and profits,
92 issues and hires of the said property there shall be paid all taxes, repairs, insurance dues, and assessments of every description accruing or to accrue and become chargeable upon the said property while the same is so kept together.

Second. I hereby direct that the sum of six hundred dollars per an-

num, in quarterly payments of one hundred and fifty dollars each, shall, out of the net rents, profits, issues, and hires aforesaid, and in preference to any other bequest in this will contained, be paid by my executor to the said Desiree or Keesiah Boubee, for and during the term of her natural life; and I also direct that during the same period she shall have, possess, and enjoy the free and undisturbed use, possession, and benefit, without any charge for rent, or anything else, of the house and lot on Leigh street, in the city of Richmond, in which I now reside; and if the said house should, during the life of the said Boubee, be injured or destroyed by fire, and the proceeds of the insurance-money be insufficient to rebuild or replace the said house in the same good condition in which it was before the same was injured or destroyed, I will and direct that a sum sufficient to effect that object be paid by my executor out of the rents, profits, issues, and hires of my estate, and that the said house be repaired or rebuilt, as may be necessary and proper.

Third. I direct that the sum of three hundred dollars per annum, in quarterly payments of seventy-five dollars each, shall, out of the net rents, profits, issues, and hires of my estate, be paid by my executors to the said Rosa L. P. Wilkins; and I also direct that for and during her natural life she shall have the free and undisturbed use, possession, and benefit, without any charge for rent, or anything else, of the house and lot on Byrd street, in the city of Richmond, in which the said Rosa L. P. Wilkins now resides; and if during her natural life the said house shall be injured or consumed by fire, and the insurance-money be insufficient to rebuild or replace the same in the same condition it was in before it was so injured or consumed, I direct that a sum of money sufficient to effect that object be paid by my executor out of the rents, issues, hires, and profits of my estate, and that the said house be forthwith rebuilt or repaired, as may be necessary and proper.

Fourth. I will and direct that my executors do, out of the monies which may come into his hands from the sales of any unimproved real estate of which I may die seized, or from the rents, issues, hires, and profits aforesaid, invest in his name, as trustee, for Rosalie Vial, my adopted daughter, in some secure stock or stocks yielding and paying an interest, the sum of two thousand dollars, which interest, as it accrues, shall from time to time be applied by my said executor to the maintenance and support of the said Rosalie Vial until she attains her full age of twenty-one years, or marries; and upon the happen-
93 ing of either of these events, the said principal sum of two thousand dollars shall be paid or transferred to her. But if the said Rosalie Vial shall die before attaining the age of twenty-one years, or marrying, I direct that the said sum of two thousand dollars, with any interest which may have accrued thereon and be unpaid to the said Rosalie Vial, shall fall into and become part of my estate.

Fifth. I will and direct that my said son, Peter Vial, for and during his own life and the lives of the said Rosa L. P. Wilkins and Desiree or Kesiah Boubee, shall be permitted, free of rent or any other charge, together with such of his children as may be residing with him at the time of his death, to use, occupy, and enjoy the house on Clay street, in Richmond, in which he now resides, together with seventy feet of ground in front on said Clay street, and running back the full depth of the lot on which the said house is situated; and I direct further that if the said house be injured or consumed by fire while he, the said Peter, and his children be permitted to occupy it as aforesaid, and the in-

surance money be insufficient to rebuild or repair the said house so as to place it in the same condition it was in before it was consumed, it shall be the duty of my executor to cause the same to be rebuilt or repaired, as may be necessary and proper, and to pay any sum of money out of my estate in addition to the insurance-money which may be necessary to effect the said object; and I further will and direct that the sum of six hundred dollars per annum, in quarterly payments of one hundred and fifty dollars each, shall be paid by my said executor to the said Peter Vial for and during the lives of himself, of the said Rosa L. P. Wilkins, and of the said Desiree or Kesiah Boubee and of the survivor of them, for the joint support and maintenance of him, the said Peter, and of his children who may be residing with him at the time of his death.

Sixth. I will and direct that for and during the lives of the said Peter Vial, Rosa L. P. Wilkins, and Desiree or Kesiah Boubee, and of the survivor of them, there shall be paid by my executor to each of the children of my late son, Thomas P. Vial, deceased, to wit: To Edward Powell Vial and Sarah Virginia Vial, the sum of two hundred dollars per annum, in quarterly payments of fifty dollars, for their several use and benefit, and upon the death of either of the said children of the said Thomas P. Vial during the lives of the said Peter Vial, Rosa L. P. Wilkins, and Desiree or Kesiah Boubee, and of the survivor of them, leaving a child or children living, the said annual sum of two hundred dollars shall be paid for the support and maintenance of such child or children in like manner as it would have been paid to the parent of such children during the lives of the said Peter Vial, Rosa L. P. Wilkins and Desiree or Kesiah Boubee and the survivor of them. But if either of the children aforesaid of the said Thomas P. Vial shall
94 die during the lives of the said Peter Vial, Rosa L. P. Wilkins, and Desiree or Kesiah Boubee, or the survivor of them, leaving no child or children living, the payment of the annual sum aforesaid to the person so dying shall cease and determine.

Seventh. I will and direct that during the natural lives of the said Peter Vial, Rosa L. P. Wilkins, and Desiree or Kesiah Boubee, and of the survivor of them, there shall be paid by my executor to each of the children of my late brother, Claudius Vial, deceased, to wit: To Susan A. E. Bondurant (who was Susan A. E. Vial), Ann Eliza Mary Vial, and Claudius Seymour Powell Vial, the sum of two hundred dollars per annum each, in quarterly payments of fifty dollars; and if the said children of my said brother, or either of them, shall die during the lives of the said Peter Vial, Rosa L. P. Wilkins, and Desiree or Kesiah Boubee, and of the survivor of them, leaving no child or children living, the said annual payment to the person so dying shall cease and determine; but if the person so dying shall leave a child or children living, the annual sum to which the parent of such child or children would have been entitled shall during the lives of the said Peter Vial, Rosa L. P. Wilkins, and Desiree or Kesiah Boubee, and the survivor of them, be applied to the support and maintenance of such child or children.

Eighth. I will and direct that during the natural lives of the said Peter Vial, Rosa L. P. Wilkins, and Desiree or Kesiah Boubee, and the survivor of them, there shall be paid by my executor to Mary Octavia Vial, a daughter of the said Peter Vial, now residing in Petersburg, in the State of Virginia, the sum of two hundred dollars per annum, in quarterly payments of fifty dollars, for her support and maintenance. If she shall die during the lives of the said Peter Vial, Rosa

L. P. Wilkins, and Desiree or Kesiah Boubee, and of the survivor of them, leaving no child or children living at the time of the death of the said Mary Octavia Vial, the payment of the said annual sum is to cease and determine; but if the said Mary Octavia Vial shall die during the lives of the said Peter Vial, Rosa L. P. Wilkins, and Desiree or Kesiah Boubee, and of the survivor of them, leaving a child or children living, the annual sum aforesaid shall, during the lives of the said Peter Vial, Rosa L. P. Wilkins, and Desiree or Kesiah Boubee, be applied to the support and maintenance of such child or children.

Ninth. I desire that my said executor do hire out my faithful slave, Peter, and that he be treated with the same kindness during his life that I have treated him with. Should he at any time to be emancipated, I direct that it shall be done, and that the sum of one hundred dollars be paid to him by my executor, in aid of his leaving the State of Virginia, unless he can obtain permission from the proper authority to remain therein.

95 Tenth. I hereby authorize and empower my said executor at his discretion, at any time he may think proper and upon such terms as he may deem beneficial for my estate, to sell all or any part of my unimproved real estate, and the proceeds thereof, together with any surplus of the rents, profits, issues, or hires which may be recived from my estate after fully providing for the annuity to the said Desiree or Kesiah Boubee, and for all the other charges of every kind thereon heretofore made, specified, and declared, shall from time to time as they may be received be invested by my said executor in some safe security yielding and paying an interest, and be held by him for and during the lives of the said Peter Vial, Rosa L. P. Wilkins, and Desiree or Kesiah Boubee, and the survivors of them, such security to be changed whenever my said executor shall deem it best so to do. And upon the death of the said Peter Vial, Rosa L. P. Wilkins, and Desiree or Kesiah Boubee, and of the survivor of them, all my estate of every description then remaining unsold (with the exception of my slave Peter, who is in no event to be sold), shall be sold by my executor, and the proceeds of such sales, together with any and every other sum of money belonging to my estate in his hands, shall be equally divided between the following named persons, if they be then living, share and share alike—that is to say, Seymour P. Vial, Mary Octavia Vial, Wm. Robert Vial, and Sarah Virginia Vial, the children aforesaid of the said Peter Vial; Edward Powell Vial, and Sarah Virginia Vial, the children aforesaid of my late son, Thomas P. Vial, deceased, and Susan A. E. (who was Susan A. E. Vial), Ann Eliza Mary Vial, and Claudius Seymour Powell Vial, children of my late brother, Claudius Vial, deceased. If at the time that such division shall be made, as above directed, any of the persons above named shall have died, leaving a child or children living at the time of such death, the share to which such person or persons so dying would have been entitled if he or she or they had lived until the time of such division shall pass to his, her, or their children respectively; but if no child or children be then living, the share or shares to which such person or persons would have been entitled had he, she, or they lived as aforesaid, shall pass to and be equally divided among the surviving persons named in this clause, share and share alike.

Lastly. Revoking all former wills by me made, I hereby nominate and appoint Wellington Goddin the executor of this my last will and testament, and direct that he shall not be required to give security as such.

In testimony that the foregoing is my last will and testament, I have

on this page, being the seventh page on which the said will is written, signed my name and affixed my seal, this twenty-first day of April, in the year one thousand eight hundred and fifty-five.

SEYMOUR P. VIAL. [SEAL.]

96 Signed, sealed, published and declared by the said Seymour P. Vial as and for his last will and testament, in the presence of and hearing of us, who at his request have attested the same, by subscribing our names as witneses in his presence.

PATRICK CULLEN,
JOHN GRAEME,
R. M. ZIMMERMAN.

CITY OF RICHMOND, *to wit:*

At a court of hustings, held for the said city, at the court-house, the 20th day of May, 1861—

This last will and testament of Seymour P. Vial, late of this city, deceased, was this day proved by the oaths of Patrick Cullen and John Graeme, two of the subscribing witnesses thereto, and was thereupon ordered to be recorded. And on the motion of Wellington Goddin, the only executor named in the said will, who made oath as the law directs, and entered into and acknowledged a bond in the penalty of one hundred and fifty thousand dollars, conditioned according to law (but without security, the will directing that none should be required of him, and which bond is ordered to be recorded), certificate is granted the said Wellington Goddin for obtaining a probate of the said will in due form.

RO. HOWARD, *Clk.*

Teste:
A copy. Teste:

BENJ. H. BERRY,
Clerk of the Chancery Court of the City of Richmond.

☞ NOTE.—Exhibits Nos. 2, 3, and 4, with petition, are copied in first record as follows: No. 4, copied as Ex. O, on page 59; No. 3, as Ex. P, page 62; and No. 2, as Ex. Q, page 64; these exhibits were first filed with the petition of W. Goddin, ex'or, page 1, Exhibit No. 5, being affidavit of Jas. A. Scott, on page 52, same record; and Exhibit No. 7, statement Benj. S. Ewell, on page 55, same record, is the same paper, except that the word "hoped," on the 9th line from top page 56 of original record, should be "thought," as it appears in the exhibit filed with petition of W. Goddin, executor.

97 *Exhibit No. 6, with petition.*

Cir. court of Richmond City.

GRAEME' EX'OR OF GRAEME, ASSIGNEE OF Marx and Fisher,
vs.
THE MUT. A. SO. OF VA.

At the trial of this cause by the court, instead of a jury, the plaintiff introduced in evidence on his part:

1. The policy of the defendants, dated the 30th day of December,

1837, and assignment thereof, mentioned in the declaration, which is in the words and figures following, to wit:

[Here to be inserted.]

2. The charter, the constitution, rules, and regulations of the defendant society, in printed pamphlet, as published by the society, to be here inserted, and used by either party.

3. The statement of agreed facts made by the parties, by their counsel, and filed in this cause June 22nd, 1874, in the words and figures following, to wit:

[Here to be inserted—page 68, printed record.]

4. Correspondence between James Lyons, esq., as pl'ff's counsel, and H. A. Claiborne, agent of the defendant, in letters, of which the following are copies, to wit:

[Of Mr. Lyons, dated 17th May, 1870; Claiborne's dated 18th, May, 1870; Lyons', dated 24th May, 1870; and Claiborne's, dated 23rd May, 1870—page 57, printed record, in suit Vial's ex'or vs. Mut. Ass. So. of Va.]

5. Affidavits and statements of certain persons, namely: Of W. Goddin, one dated 12 Jan'y, 1877, and another dated 30th January, 1877; of Mr. Wickham, dated Feb'y 15th, 1877; of James A. Scott, dated May 16th, 1877; of B. S. Ewell, dated 5th November, 1873; and of I. H. Carrington, dated 12th Nov. 1873; which are accepted as evidence, so far as they are not inconsistent with or contradictory of the facts stated in the aforesaid agreement of 22nd June, 1874, and to avail, as far as may be lawful and relevant; also, paper marked "Diagram," indicating streets and localities mentioned in the cause.

And the defendants introduced in evidence on its part:

1st. A copy of the record of the proceedings of the standing committee of the defendant society of the 17th May, 1865, duly certi-
98 fied, in the words and figures following, to wit: (Page 35, printed record.)

2nd. A copy of the resolution adopted at a meeting of the standing committee of the defendant society 31st July, 1865, duly certified, in the words and figures following, to wit: (Page 35, printed record.)

3rd. The affidavit of Henry D. Danforth, of January 4, 1874, to wit: (Page 56, printed record.)

Which are accepted as evidence, to avail as far as may be lawful and relevant.

Agreed to.

W. W. CRUMP,
For Defendant Co.
JAMES NEESON,
For Defendants.
JAMES LYONS,
JOHN HOWARD,
Counsel for the Pl'ffs.

MAY 31ST, 1877.

The foregoing is a true copy of a paper filed in the suit of Graeme's ex'or against Mutual Assurance Society of Va., lately pending in the circuit court of the city of Richmond.

Teste:

ALFRED SHEILD, *Clk.*

OCTO. 19TH, 1877.

Depositions for plaintiffs.

In the chancery court of the city of Richmond.

WELLINGTON GODDIN, EXECUTOR OF S. P. Vial,
vs.
THE MUTUAL ASSURANCE SOCIETY AGAINST Fire on Buildings of the State of Virginia.

The defendant in the above-entitled suit will please take notice that on the 13th day of March, 1879, between the hours of 9 a. m. and 4 p. m., I shall proceed, at the office of Robert Howard (Shafer's building), in the city of Richmond, to take the depositions of John A. Meredith and others, to be read as evidence in my behalf in the above-entitled suit; and that if from any cause the taking of the said depositions should not be commenced on that day, or if commenced be not completed, the taking of the same will be continued from day to day, and from time to time, at the same place and between the same hours, until completed.

Respectfully,

WELLINGTON GODDIN,
Executor of S. Vial,
By JOHN HOWARD,
Of Counsel.

ARCH 12, 1879.

99 Executed in the city of Richmond, Mar. 12, 1879, by delivering to H. A. Claiborne, principal agent of the Mutual Assurance Society against Fire on Buildings of the State of Virginia, he being a resident of the city of Richmond.

P. P. WINSTON, *D. S.*,
For JOHN W. WRIGHT,
S. C. R.

The depositions of John A. Meredith and others, taken before M. L. Spotswood, a notary public of the city of Richmond, pursuant to notice hereto annexed, at the office of Robert Howard, esq. (Shafer's building), in the city of Richmond, between the hours of 9 a. m. and 4 p. m., on the 13th day of March, 1879, to be read as evidence on behalf of Wellington Goddin, executor of S. P. Vial, in a certain suit in equity depending in the chancery court of the city of Richmond, wherein Wellington Goddin, executor of S. P. Vial, is plaintiff, and The Mutual Assurance Society against Fire on Buildings of the State of Virginia is defendant.

Present, John Howard, counsel for plaintiff.

F. DAVIDSON, having first duly affirmed, deposes and says:

1st question (by JOHN HOWARD). What is your age, residence, and occupation, and place of business?

Answer. My age is fifty-five years. My present residence is in Henrico Co., but I come into Richmond daily and practice my profession of dentistry at my office on Grace street.

2nd question (by JOHN HOWARD). State when you came to Richmond to live, and how long you lived in the city before moving your residence to the country.

Answer. I came to Richmond to live in 1857. Lived here until 1870. After that I was absent about two years. I then returned and have been doing business here ever since.

3rd question (by JOHN HOWARD). In what part of the city was your residence during the late war?

Answer. On Main street, between 9th and 10th streets, on the south side, and on the same lot now occupied by Meade & Baker as a drug-store.

4th question (by same). State if you were in Richmond on the morning of the 3rd of April, 1865.

Answer. I was.

5th question (by same). State whether or not there was a great fire in this city on that day; and, if so, state what you know about it.

Answer. There was a great fire on that day, and I had occasion to observe it very particularly. I was coming up Cary street just
100 about daylight. When we came by Shockoe Slip a man went by with a torch into the warehouse, and before we reached 10th street we looked back to see if the warehouse had been fired, as we supposed it was his intention to fire it when he went in there, and we saw the smoke issuing to a great height from that warehouse. I then came home and went up to the upper part of my house and looked out and saw the column of smoke rising perpendicularly; for sometime it seemed to stand perfectly still and straight without moving except upwards. In a little while it commenced to bend towards Main street. Very soon I could feel the wind blowing (the morning had been very still before) and the smoke was drawn up toward my house and over the city by the wind. After breakfast I went down to Cary street near the Gallego Mills. The wind blew the flame right in against these mills and very soon they were fired. The fire progressed in the mills until very soon the roof fell in. When the roof fell in a shower of fire, that is, of coal and shingles, chunks or burning brands, and coals were carried by the wind over toward Main street, and fell on the tops of houses even beyond Main street. As soon as I saw the mills were fully on fire I left and went back to my house and watched the fire from there. In the mean time the canal company's shed took fire and all the buildings near the mills. When the roof of the mills fell in I was at my house. Some of the coals of fire were driven through the open dormer windows of my house and my house caught on fire. I think it was about the first house that caught fire on that square. We put the fire out and then I got on top of my house and fought the fire; that is to say, put out the coals and shingles with buckets of water as they fell on top of my house. A great many persons were engaged in this way on the houses on that street. As the fire increased the shower of coals also increased. After awhile I could no longer stand upon my house and had to give it up. Other houses on the street caught from the top about the same time as mine did. The wind was then blowing very strong. My house was consumed.

6th question (by same). Was or not the wind strong enough from the first time you saw the fire after breakfast to carry the fire over the city of its own force?

Answer. Certainly it was, for it actually did carry the fire over the city. The wind grew stronger until somewhere toward eleven or twelve o'clock, by which time a large portion of the city had been burned. A great many persons carried their furniture to the capital square, where they had to protect it from the falling coals blown by the wind. A good deal of this furniture which was not properly protected was burnt

up. I remember to have seen a good many persons on the square whose clothes were on fire caused by coals dropping on their backs.

101 About the time the fire got to 9th street the wind seemed to change its course, being more south or southwest. It came from the south or southeast before. The change of the wind gave the Federal troops an opportunity to stop the fire. They had been fighting it before in vain. They had tried to stop it on 10th street. That was the first I saw of their attempts to stop it, but the wind was then too strong and too many houses were on fire.

And further this deponent saith not.

F. DAVIDSON.

Judge Meredith appeared, but having to attend court asked to be excused, and signified his intention of attending to-morrow.

No other witness appearing, the further taking of these depositions is continued until to-morrow, at the same time and same place.

M. L. SPOTSWOOD, *N. P.*

OFFICE OF ROBERT HOWARD, ESQ., SHAFER'S BUILDING,
Richmond, Va., March 14th, 1879.

Depositions resumed.

Present, John Howard, counsel for plaintiff.

Judge JOHN A. MEREDITH, a witness for the plaintiff, being first duly sworn, deposes and says:

1st question (by JOHN HOWARD). If you are a citizen, please state how long you have been said citizen, and what is and has been your occupation.

Answer. I have been a citizen of Richmond for the past forty years; am a lawyer by profession, and for nine years prior to the war and during the war I was judge of the circuit court of said city.

2nd question (by same). Please state whether or not you were in the city on the 2nd and 3rd day of April, 1865, and what part you had, if any you had, in the surrender of the city to the Federal forces on the morning of the 3rd day of April, 1865; and state, if you know, where and at what time said surrender took place; and please further state whether or not you observed a fire in the city on the morning of that day, and, if so, the character and extent of the fire; and whether or not from the time you observed it there was a strong wind blowing from the southeast or south, sufficient of its own power to carry the fire from the place or places of its origin over the city; and please state any facts or circumstances within your knowledge tending to show by what means the said fire was extended and conveyed, if it was extended and conveyed, over any considerable part of the city.

102 Answer. I was residing in the city on the 2nd and 3rd April, 1865, and was requested on the evening of the second of April, by the city council, to accompany the mayor, Judge Lyons, and a portion of the council, to meet the Federal troops and surrender the city, and ask for protection to persons and property; a letter to that effect was prepared that night, and the next morning delivered by the mayor to the officer commanding the first detachment of troops that entered the city. We left the city about half-past two o'clock in the morning of the third, and reached the outer line of fortifications before daybreak, and before sunrise the last detachment of Confederate cavalry, under Gen'l Gary, passed us on their way to Richmond. A short time thereafter a company of Federal cavalry, commanded by Major Ste-

vens, appeared; we met them, and the mayor handed the letter to him. On reading it, he remarked that they had learned that morning of the evacuation of the city, and that stringent orders had been issued to protect persons and property, and that we need not feel any apprehension on that subject. After some conversation about the best mode of preserving order in the city, he proposed to the mayor to accompany him, and they moved rapidly on to the city. The rest of us followed in carriages. We went immediately to the city hall, where we found the mayor and Major Stevens; the latter was then dictating a very stringent order for the protection of the citizens of the town and their property. He advised us to repair to the fire and set an example to the people of the city to arrest, if possible, the progress of the fire. All of us, except the mayor, at once repaired to the fire. We found the engine at work on 13th street, between Main and Cary street, near the corner of Main. We went to work, and continued at work about fifteen minutes, when the fire, which was then advancing from Cary to Main street, forced us to move the engine to another point. I then left for breakfast, having been up all night without anything to eat. As soon as I had breakfasted I returned to the fire, and found the engine on 9th street, between Main and Cary. I remained there but a short time, as we were forced to move by the advance of the fire and the explosion of shells which had been stored by the Confederate authorities in a building near by. This was between 10 and 11 o'clock, I think. I then repaired to the capitol square, the lower side of which was covered with furniture removed for safety from the adjoining buildings. I soon saw that the State court was in danger, the fire having progressed to the corner of 12th and Franklin streets. The portico of the State court-house soon caught on fire, and I then united with the clerk and such other persons as I could induce to aid us in removing many of the papers, and depositing them in the auditor's office. About this time I saw Mr. H. Exall in the southern portico of the capitol, and learned from him that one of the windows of the capitol had
103 been on fire. Near the same time the railing around the steeple of St. Paul's Church caught on fire. In returning to the city that morning I saw that the city was on fire, and when I entered the city the fire had crossed Cary street towards Main, and was above and below 13th street. There was a brisk wind blowing from the river over the city when I entered the city. I noticed it several times during the morning, because I believed it would be almost impossible to arrest the fire until the wind lulled. I am satisfied the wind was strong enough to carry the sparks over several buildings, and catch at more remote points, and that the fire was by that means spread over a large extent. My impression is that the wind lulled about 12 o'clock, and that the progress of the fire was arrested about one o'clock, chiefly by the exertions of the Federal troops.

And further this deponent saith not.

JOHN A. MEREDITH.

No other witness appearing, the further taking of these depositions is continued until to-morrow morning at the same time and place.

M. L. SPOTSWOOD, *N. P.*

RICHMOND, VA., *March 15th*, 1879.

Depositions resumed at the office of Robert Howard, esq., Shafer's building.

Present, John Howard, counsel for plaintiff.

WELLINGTON GODDIN, a witness for the plaintiff, being first duly sworn, deposes and says:

1st question (by JOHN HOWARD). Are you the plaintiff in this case?

Answer. I, as the executor of S. P. Vial, am.

2nd question (by same). It appears by the stipulation of counsel in the three cases of Graeme's executor against the Mutual Assurance Society against Fire on Buildings of the State of Virginia, and also by the record in these cases, that you gave two affidavits which were introduced and received as evidence, one bearing date the 12th day of January, 1877, and the other bearing date the 30th day of January, 1877. Please look at the paper marked "Goddin, affidavit No. 2," bearing date the 30th day of January, 1877, and to be filed with your deposition in this case, and say what that paper is, and whether the statements therein contained are true.

Answer. The paper referred to is an attested copy of the original. The original is now before me, and having read it again, do hereby reiterate the statements therein contained, as I believe them to be strictly true. I adopt them as if they were now repeated.

104 3rd question (by same). Have you or not recently seen and read an affidavit given by you in this present cause bearing date of the 11th day of May, 1878, in respect to what transpired between you and the defendants in this case in 1867 in respect to certain policies of insurance issued upon buildings erected upon the site of the buildings destroyed by fire, indemnity for which is claimed in this suit; and, if so, say whether or not the statements therein are true?

Answer. I have recently read carefully the affidavit referred to, and readopt the same as containing what my recollection at the time enabled me to state, and I believe the statements therein contained to be strictly true, and hereby reaffirm them as if herein again repeated.

At this point Mr. Wellington Goddin requested to be allowed to leave, owing to a pressing business engagement. His deposition will be resumed Monday at the same time and place. The deposition of Miss Wood, though now to be taken, will be paged and numbered after this.

M. L. SPOTSWOOD, *N. P.*

RICHMOND, VA., *March 17th*, 1879.

The deposition of Wellington Goddin resumed at the office of Ro-*Ro*bert Howard, esq., Shafer's building.

Present, John Howard, counsel for plaintiff.

4th question (by JOHN HOWARD). In your said affidavit of the 30th day of January, 1877, a copy of which has been filed with this deposition, you say as follows: "This affiant knew Col. John Rutherford, the principal agent of the Mutual Assurance Society against Fire on Buildings of the State of Virginia, and was informed by him soon after the fire that his society would pay nothing on account of it because it was an act of war, and it very soon became matter of notoriety in the city of Richmond that the society would not pay anything on account of that fire, and thereby this affiant and Mr. Graeme, as well as others,

were deterred from taking any steps for the recovery of their losses." To what losses do you refer specially?

Answer. To the losses involved in this suit and to my own individual losses insured in this company.

5th question. Were or not the annual quotas on the policies in suit regularly paid by you on the property of S. P. Vial from the time of your qualification as his executor up to the date of the fire in question?

Answer. The quotas were regularly paid by me as executor.

6th question (by same). Please state who are your counsel in this suit, and how you came to employ them.

105 Answer. Messrs. James Lyons and John Howard are my counsel in this case, and were employed as such under a written contract; a copy of which, marked Exhibit No. 3, which is in my handwriting, is hereto annexed, and speaks for itself. But to be more specific I will state that Mr. John Graeme was an intimate friend of the late S. P. Vial, and as Mr. Graeme had lost a very large sum by the burning of his houses, and as he had consulted Mr. Lyons and Howard to represent him, I, by his advice and recommendation, employed the same gentlemen to represent me as the ex'or of Mr. Vial in prosecuting this suit, as the contract aforesaid will show. I regarded each one as equal to the other, and both jointly as my counsel. Mr. Lyons, who had the original contract in his possession, told me last year that he had lost it, and he sent me a duplicate one, which I signed, and which is the one referred to in the copy herewith filed, marked Exhibit No. 3. It is proper to remark that when Mr. Graeme conferred with me I stated that I would consult my friend and counsel, Alex. H. Sands, and let him know in a few days. In a few days thereafter I saw Mr. Graeme and informed him that I had consulted Mr. Sands, who advised me to bring the suit and employ the same counsel that he had employed, and thereupon I authorized him to act accordingly. Thereupon Messrs. Lyons and Howard were employed by me as ex'or aforesaid. So far as I am concerned, the counsel aforesaid have worked faithfully and laboriously on the case, and I have had no occasion to find fault with either of them. I regretted to hear that there was some disagreement between my counsel as to the management of the case, but have studiously avoided taking any part in the disagreement, and have always been anxious that the parties should heal their disagreement.

7th question (by same). Have you or not upon any occasion authorized Mr. Lyons to act for you exclusive of Mr. Howard?

Answer. Not to my recollection. It has certainly never been my purpose to do so.

8th question (by same). Have you by any act of yours intentionally ratified or sanctioned the action of Mr. Lyons in the exclusion of Mr. Howard?

Answer. I have not.

9th question (by same). Have you or not recently in open court, before Judge Fitzhugh, in this case, made a statement of facts in respect to the above matters; if so, please state the substance of the same, or the whole of it if you prefer?

Answer. As an act of justice to myself and Messrs. Lyons and Howard, my counsel in this case, a few weeks ago I went before Judge Fitzhugh and made an oral statement of the facts in reference to the employment of these gentlemen as my said counsel. I do not deem it necessary to repeat the whole of said statement, but I think the

106 substance of it is fairly set forth in this deposition. I read the copy of the contract, marked Exhibit No. 3, to the court, and referred the court to that contract as embodying the authority to them, as I could not myself decide between them, as the contract spoke for itself. As I was giving my deposition in this case on Saturday last I deemed it my duty to apprize him of that fact, and received from a letter which, at his request and by permission, I file with this deposition, marked Exhibit No. 4.

(Mr. Howard here requested the notary to state that Mr. Lyons having undertaken to argue and submit the case to the court without consulting him (Mr. Howard) it was thought to be useless to notify him of these depositions, which the correspondence just referred to shows to have been correct, it being deemed sufficient to give notice to the defendant, who was a party to the suit.)

10th question (by same). Did you or not upon the occasion to which you have referred before Judge Fitzhugh intentionally do or say anything to authorize or justify the suggestion or inference that you desired the court to accept the said alleged agreement of facts as the real facts in the case, and notwithstanding the opposition made to that alleged agreement by Mr. Howard?

Answer. I say no: I did not.

11th question (by same). Was or not the taking of these depositions authorized by you upon notice previously given by you by Mr. Howard as your counsel?

Answer. I authorized them to be taken according to Mr. Howard's advice.

12th question (by same). In your judgment do or not the rights and interests of your testator's estate require that they should be read and considered in the case?

Answer. I certainly think so.

And further this deponent saith not.

W. GODDIN.

No other witnesses appearing, the further taking of these depositions is continued until to-morrow morning, at the same time and place.

M. L. SPOTSWOOD, *N. P.*

Miss BETTIE WOOD, a witness for the plaintiff, being first duly sworn, deposes and says:

1st question (by JOHN HOWARD). How long have you been residing in Richmond?

Answer. I came to Richmond to live in 1864, but I had been here off and on for ten years before.

107 2nd question (by same.) Where were you residing on the morning of the 3rd day of April, 1865?

Answer. In the middle building of the old Park house, on Bank street, between 9th and 10th streets, in the city of Richmond.

3rd question (by same.) How many buildings or tenements were there known as the Park house?

Answer. There were three. The one we lived in was rented by my brother-in-law, William L. Montague.

4th question (by same). How far was the building you occupied from the lot on the corner of 10th and Bank streets, on which there is a large building, now occupied in part by the Mutual Assurance Society against Fire on Buildings of the State of Virginia?

Answer. There was one tenement on the right-hand side of the one

we occupied, which was between the one we occupied and the corner lot, on which there stood a large brick building then occupied by quartermaster's department of the Confederate States.

5th question (by same). Please state whether the tenement in which you have lived as above deposed was destroyed by fire on the 3rd day of April, 1865; and, if so, state the circumstances under which it caught fire and was destroyed.

Answer. It was destroyed by fire, and my impression is from the falling cinders from the big mills known as the Gallego Mills. The wind was blowing from the south or southeast, and the large sparks or burning coals were blown from the fire at the mills, as I suppose; these fell upon the ornamented railing around the top of the house in which we lived and set them on fire. The railings were of wood.

6th question (by same). When did you first discover that the house was on fire?

Answer. I think, as well as I remember, it was about eight o'clock. I know it was before breakfast. The fire was then put out by pouring buckets of water upon it from the dormer windows and by sweeping out the back porch, in which the burning cinders were rapidly falling. We were kept constantly occupied at this, for the coals were falling all the time.

7th question (by same). Did you perceive any other house on that street, or down on Main street, on fire at that time?

Answer. Not one; we could see from the dormer windows all over the lower portion of the city.

8th question (by same). Did you remain in the house until it was finally burned?

Answer. No, sir; I went up town with my sick sister to a place of safety on 2nd street, between Clay and Leigh streets. I then returned to try and save some of her effects. I went into her bedroom on the second floor and secured her toilet set. I then left the house,
taking the set with me in a basket, and then returned to the
108 house. I found it unsafe to enter, for it was on fire on top and
from the back porch, where there was lattice work; this was about eleven o'clock, I think.

9th question (by same). Were there any other houses on that square then on fire?

Answer. I only noticed the three tenements above mentioned; they were all on fire, and we accounted for the fact of their catching first because they were higher than the buildings around, and because of the wooden balustrade and lattice work which I have mentioned. I think the house mentioned as the quartermaster's department caught from our tenement.

10th question (by same). What was the character of the wind blowing from the time you noticed it to the time the house was destroyed?

Answer. It was a good, stout south wind, which did not lull until about twelve o'clock. I remember by about twelve o'clock our house was completely destroyed. I say twelve o'clock, because I remember remarking to a Federal officer that at six hours ago we were comfortably off and were now ruined. When our house was falling I could see other houses around it on the same square just beginning to catch.

11th question (by same). Do you remember where the war department was, and whether it was destroyed; if so, state where and when?

Answer. It was on 9th street, one lot intervening between it and Franklin street. It was between Main and Franklin street. It caught afire after our house was destroyed.

12th question (by same). What was the character of the sparks or cinders of which you have spoken?

Answer. Of a variety of characters; some were small, some were quite large; some seemed to be of hard wood, and some of light; some were bright red coals. I remember to have seen some pieces of slate; they were blown over by the wind. When I got back to the house for the last time the fallen cinders had so covered the pavement that they burnt my feet.

13th question (by same). Did, or not, these cinders come from your house then burning?

Answer. The house was not sufficiently gone for that; it was then fairly catching on fire, and those cinders were like those I had observed on the top of the house before.

14th question (by same). Was, or not, the wind strong enough during the time of which you have spoken to carry such sparks or cinders over the city?

Answer. I think it was. I know they came from the burning mills to our house soon in the morning, as I have above stated.

And further this deponent saith not.

BETTIE J. WOOD.

109 Miss H. J. WOOD, a witness for the plaintiff, being first duly sworn, deposes and says:

1st question (by same). When did you first come to Richmond to live?

Answer. October twenty years ago.

2nd question (by same). Have you, or not, been living here ever since?

Answer. Yes, sir; I have.

3rd question (by same). Where did you reside on the morning of the 3rd day of April, 1865?

Answer. On Bank street, between 9th and 10th streets, with my brother-in-law, Mr. William L. Montague, in the middle tenement of what was known as the Park house.

4th question (by same). Was, or not, that house destroyed by fire on that day; and, if so, state what you know about it?

Answer. It certainly was destroyed by fire on the 3rd day of April, 1365. It caught by cinders falling from the Gallego Mills at an early hour in the morning. My sister Bettie and myself conquered it for a while by pouring buckets of water upon the cinders as they fell on the roof of our house. This we did from the dormer windows; we did this several times. Then we went to sweep out the back porch. The house first caught on fire at the wooden ballustrade which ran all round the top. The porch caught from the ornamented lattice work on which the burning cinders had fallen. My married sister, who was sick at the time, left the house with my sister Bettie. I was kept occupied until my sister Bettie returned, which was about eleven o'clock, brushing off the cinders and pouring water on the burning coals. Two little colored girls were helping me. I believe we saved the house for about two hours by our exertions. By the time my sister Bettie returned, at eleven o'clock, it became unsafe for us to remain in the house, and our friends advised us to leave; by twelve o'clock the house was entirely consumed. The wind blew briskly from the time I saw the mills on fire—at times a perfect gale. It did not lull until about twelve o'clock, by which time it became calmer, and began to change its course, being then more south or southwest. From the first I saw of the fire the

sky seemed to be filled with cinders blown by the wind, until the wind ceased and the fire was stopped.

5th question (by same). What houses, if any, were on fire on that square when the house you lived in finally took fire and you had to leave it, as you have above stated?

Answer. I did not see any other house burning at the time I had to leave our house, until ours was nearly consumed and others began to catch. My impression is that the other houses on that square
110 caught from our house. The three tenements known as the Park house were consumed about the same time. I think the two adjacent tenements caught from ours. They were private residences, and were separated by an iron railing from ours, which had been a boarding-house until Mr. Montague took it, the fall before the evacuation.

6th question (by same). How and by whom was the house occupied?

Answer. By two families; my mother, Mrs. Wood, and my sister and myself occupied the third floor; Mr. Montague's family occupied the second floor; and the Confederate signal corps occupied the first floor, which was the ground floor.

And further this deponent saith not.

H. J. WOOD.

RICHMOND, VA., *March 18th*, 1879.

Depositions continued at the office of Robert Howard, esq., Shafer's building, Richmond, Va. (See continuance noted at the foot of Wellington Goddin's deposition.)

M. L. SPOTSWOOD, *N. P.*

Present, John Howard, counsel for the plaintiff.

J. B. GRAEME, a witness for the plaintiff, being first duly sworn, deposes and says:

1st question (by JOHN HOWARD). Please state your age, residence, and occupation.

Answer. I am 27 years old; reside in Richmond, and am bookkeeper at the Whig office; and am now acting business manager.

2nd question (by same). Look at the paper now here shown you, marked Exhibit No. 5, and to be filed as part of your deposition, and say what it is.

Answer. This is an advertisement which appeared in the Richmond Whig from January 1st, 1875, to December 27th, 1876.

3rd question (by same). Can you state how long thereafter it appeared?

Answer. I cannot; the file for the half year following December 27th is missing; upon the file of July, 1877, this advertisement appears in a modified shape.

4th question (by same). What was the modification?

Answer. The modification is the omission of the following paragraph, "ten million dollars' property pledged to pay losses."

5th question (by same). By whose authority was the said advertisement published in the Whig?

111 Answer. I am unable to say who gave the order; the bill for the advertisement was paid upon presentation at the office of the Mutual Assurance Society of Virginia.

And further this deponent saith not.

J. B. GRAEME.

No other witness appearing, the further taking of these depositions is continued until to-morrow, at the same time and place.

M. L. SPOTSWOOD, *N. P.*

OFFICE ROBERT HOWARD, ESQ.,
SHAFER'S BUILDING, RICHMOND, VA.,
Richmond, Va., March 20th, 1879.

No witness appearing, the further taking of these depositions is continued until to-morrow, at the same time and place.

Present, John Howard, counsel for the plaintiffs.

M. L. SPOTSWOOD, *N. P.*

OFFICE ROBERT HOWARD, ESQ.,
SHAFER'S BUILDING, RICHMOND, VA.,
Richmond, Va., March 20th, 1879.

No witness appearing, the further taking of these depositions is continued until March 22nd, 1879, at the same time and place.

Present, John Howard, counsel for the plaintiff.

M. L. SPOTSWOOD.

OFFICE ROBERT HOWARD, ESQ.,
SHAFER'S BUILDING, RICHMOND, VA.,
Richmond, Va., March 22nd, 1879.

No witness appearing, the further taking of these depositions is continued from day to day until some witness does appear.

M. L. SPOTSWOOD, *N. P.*

Present, John Howard, counsel for plaintiffs.

112 CITY OF RICHMOND,
State of Virginia, to wit:

I, M. L. Spotswood, a notary public for the city and State aforesaid, do hereby certify that the foregoing depositions were duly taken, sworn to, and subscribed before me at the times and place mentioned therein.

Given under my hand, this 5th day of May, 1879.

M. L. SPOTSWOOD, *N. P.*

Notary's fee, $30.00, not paid.

M. L. SPOTSWOOD, *N. P.*

Exhibit No. 2, with deposition of W. Goddin.

This day Wellington Goddin personally appeared before me and made oath that he was well acquainted with the property of the late John Graeme, situated at the southwest corner of the square bounded by Main and 12th street', and fronting on both Main and 12th streets. Early in the morning of the 3rd April, 1865, before the Federal army entered the city of Richmond, the tobacco warehouse, situated below the basin, very near to and below Warwick's mill, from which it was separated only by 12th st., and very near to the James River Canal, was set on fire, as this affiant understood and believes, by the Government of the Confederate States. That when it was set on fire, there was no unsual wind blowing, but soon after it was set on fire a high wind arose, blowing from the south, rather to the northwest, and the fire was driven to Warwick's mill, which was a very large and tall building, and thence to the property

lying north of it, until it reached and consumed the property of Mr. Graeme, consisting of five houses. That Mr. Graeme's houses were distant from the warehouse about one thousand (1,000) feet, and according to the best belief and personal observation of this affiant, the fire from the warehouse could not have reached the property of Mr. Graeme without the high wind prevailed; that by that high wind it was carried to and beyond Mr. Graeme's property across Main street, and consumed a great deal of property there. A good deal of the property of this affiant was consumed by the same fire, and his attention was very much directed to the fire and all the circumstances connected with it. That the Federal troops came into Richmond while the fire was in progress, and rendered most efficient aid in arresting its progress, and, as far as this affiant saw and heard, did nothing to increase it or produce disturbance. The affiant knew Col. John Rutherford, the principal agent of the Mutual Assurance Society against Fire on
113 Buildings of the State of Virginia, and was informed by him soon after the fire that his society would pay nothing on account of it, because it was an act of war; and it very soon became matter of notoriety in the city of Richmond that the society would not pay anything on account of that fire, and thereby this affiant and Mr. Graeme, as well as others, were deterred from taking any steps for the recovery of their losses. From all that this affiant saw and heard, and he had the best opportunity for both seeing and hearing, he is satisfied that the original fire was caused solely by the officers of the Confederate Government, and but for the very high wind would not have extended as far as the property of Mr. Graeme, or any other property on Main street, or north of it.

W. GODDIN.

Sworn to by W. Goddin in my presence, and before me, a notary public, in and for the city of Richmond, this 30th Jan., 1877.

JOHN T. GODDIN, *N. P.*

I beg leave to amend the foregoing affidavit by making the following addition: Whilst I am not distinct as to my recollection of the character of the wind, I well remember that the Gallego mills were previously twice destroyed by fire, and in neither case did the fire extend to the north side of Cary street, but on one occasion it did extend to the south side of that street, and destroyed most of the brick tenements between Eleventh and Twelfth streets. So large were the coals of fire on the morning of the evacuation of Richmond, that at my residence on Sixth, between Clay and Leigh streets, my family had to place buckets of water on the back porch to keep it from taking fire, and it seems to me perfectly certain that but for the high wind these large coals of fire could not have been carried to my residence, a distance of about half mile from the Gallego mills.

W. GODDIN.

A copy. Teste:

ALFRED SHEILD, *C. C.*

(Copy.)

Exhibit "No. 3," with deposition of W. Goddin.

MEMORANDUM.

The contract between James Lyons, John Howard, attorneys at law, and Wellington Goddin, executor of the late will and testament of Sey-

mour P. Vial, for the prosecution of a suit in the chancery court of Richmond, in the name of the said executor against the Mutual
114 Assurance Society against Fire on Buildings of Virginia having been lost, it is now agreed between the undersigned, Goddin, Lyons, and Howard, that the said Lyons and Howard, attorneys at law, shall prosecute the said suit until its final termination, and for their compensation shall receive one-third of all that may be recovered in the said suit, and shall have no claim against the said Goddin or of the estate of Seymour P. Vial for any other fee or reward, but the said Goddin, as executor, will pay all clerks' and sheriffs' fees and printers' bills in the said suit.

Witness our hands and seals this 29th day of March, in the year 1878.

JAMES LYONS. [SEAL.]
JOHN HOWARD. [SEAL.]
W. GODDIN, [SEAL.]
Ex'or of S. P. Vial, dec'd.

Exhibit "No. 4," with deposition of W. Goddin.

RICHMOND, 15 *March*, 1879.

MY DEAR SIR: Mr. Jno. Howard has called on me to give a deposition in "Vial, ex'or, vs. Mutual Assurance Society." I am now at Robert Howard's office for the purpose of answering such questions as may be propounded to me. I feel it my duty to give you this information.

In great haste, yours, truly,

W. GODDIN,
Ex'r of S. P. V.

Hon. JAS. LYONS.

MY DEAR GODDIN: I understand that Chancellor Fitzhugh has decided that the case shall not be opened again. To take a deposition without the leave of the court will not only be useless, but, in my opinion, a contempt of the court. Mr. Howard is not a party to the cause, nor is he now an attorney in it, and I cannot conceive of any right he has to take depositions, and I will have nothing to do with it. If you want me to be present when you make your affidavit, of course I will, but it must be her' as I am physically unable to go to any other house.

Yours, truly,

JAMES LYONS.

You must file this note with any affidavit you may make.

115 *Exhibit "No. 5," with deposition of J. B. Graeme.*

RICHMOND, VA., *March 18th*, 1879.

I hereby certify that the advertisement of which a copy is appended appeared in the Richmond Whig, daily, from Jan. 1st, 1875, to Dec. 27th, 1876.

RICHMOND WHIG PUB'G CO.,
Per J. B. GRAEME.

INSURANCE COMPANIES.

Mutual Assurance Society of Virginia, incorporated in 1794. Office corner Tenth and Bank streets. Insures buildings by perpetual or an-

nual policy. $10,000,000. Property pledged to pay losses. Losses equitably adjusted and promptly paid.

HERBERT A. CLAIBORNE,
Principal Agent.

HENRY D. DANFORTH, *Secretary.*
JOHN BLAIR, *Collector.*

Order.—May 6th, 1879.

W. GODDIN, EX'OR OF S. P. VIAL, DEC'D, plaintiff,
against
MUTUAL ASSURANCE SOCIETY OF VIRGINIA, defendant.

On the 6th day of May, 1879, came John Howard and tendered the court his petition in this cause, and asked leave to file the same.

On consideration whereof the court doth refuse the said leave to file and doth reject the same.

116 *Petition of John Howard.*

In the chancery court of the city of Richmond.

WELLINGTON GODDIN, EX'OR OF S. P. VIAL,
vs.
THE MUTUAL ASSURANCE SOCIETY AGAINST fire on buildings, of Virginia.

The petition of John Howard respectfully states that he is interested in the subject-matter of this suit, being entitled by virtue of a contract in writing under seal bearing date the day of , 1878, entered into between the plaintiff and your petitioner and Mr. James Lyons, to receive one-sixth part of the recovery against the defendant, a copy of which said contract has been filed by the plaintiff, together with certain depositions taken in his behalf; and your petitioner therefore prays that he may be made a party plaintiff in this suit. He hereby adopts all of the allegations made in the original and amended bills and in a petition filed by the plaintiff bearing date the 5th day of May, 1879, as if the same were herein repeated, and your petitioner respectfully states further that the alleged "agreement of counsel" and the submission of the case to the court was in derogation of your petitioner's rights and detrimental to his interests in the suit; that it was done in exclusion of and without notice to him, and that the defendant well knew the fact, and participated in said action with such knowledge; that he is advised and insists said alleged agreement and submission are alike void; and he prays that the whole matter may be enquired into by the court; that said alleged "agreement of counsel" and all action had thereon may be set aside or disregarded; that the cause may be regularly matured for hearing, if not now matured, and regularly heard upon the merits; that your petitioner may have the benefit of all the relief sought in the said pleadings filed by the plaintiff, and that full and general relief may be granted to him in the premises; and he will ever pray, &c.

JOHN HOWARD.

Paper filed in the cause.

CHAPTER 5.—An act to regulate the destruction of property under military necessity and to provide for the indemnity thereof.

. The Congress of the Confederate States of America do enact that the military authorities of the Confederate army are hereby authorized and directed to destroy cotton, tobacco, military and naval
117 stores, or other property of any kind whatever which may aid the enemy in the prosecution of the war, when necessary to prevent the same, or any part thereof, from falling into the hands of the enemy.

SEC. 2. Be it further enacted, That the owners of property destroyed under the operation of this act, as well as those persons who shall voluntarily destroy their property to prevent the same from falling into the hands of the enemy, are hereby authorized to perpetuate the testimony of such destruction in the manner prescribed by an act of the provisional congress, entitled "An act to perpetuate testimony in cases of slaves abducted or harbored by the enemy, and of other property seized, wasted, or destroyed by them," approved thirtieth August, eighteen hundred and sixty-one; and such owners and persons shall be entitled to indemnity out of the proceeds of property sequestered and confiscated under the laws of the Confederate States, in such manner as Congress may hereafter provide.

Approved March 17th, 1862.

True copies. Teste:

BENJ. H. BERRY, *Clk.*

Fee, $16.80.

I, Benjamin H. Berry, clerk of the chancery court of the city of Richmond, do hereby certify that the foregoing copies, together with the record under the short style of "Vial's ex'or v. Mutual Assurance So. of Va.," constitute a full and true transcript of the record in said cause, except the plats and some policies of insurance left out by direction.

Given under my hand this 5th February, 1880.

BENJ. H. BERRY, *Clk.*

I, Benjamin H. Berry, clerk of the chancery court of the city of Richmond, do hereby certify that on the paper, "agreement of counsel," copied on page 49 first record, appears the following endorsement:

"This so-called agreement was signed and the case submitted to the court without notice to me, and I never saw it until it was handed to me by the court with the other papers in the cause. It does not, in my judgment, do the plaintiff justice, and, as one of the original counsel in the cause, I respectfully object to it, and enter this my protest against it; and I ask that the case may be regularly matured for hearing before it is heard.

"JOHN HOWARD.

"MARCH 1ST, 1879."

Given under my hand this 5th February, 1880.

BENJ. H. BERRY, *Clk.*

A copy. Teste:

GEO. K. TAYLOR, *C. C.*

118 And at another day, to wit, at a supreme court of appeals held at the State court-house, in the city of Richmond, on Tuesday, March 23rd, 1880,

This cause was this day partly heard upon the transcript of the record of the decree aforesaid and the arguments of counsel, ard continued until to-morrow.

And at another day, to wit:

WEDNESDAY, *March* 24, 1880.

This cause was this day further heard upon the transcript of the record of the decree aforesaid and continued until to-morrow.

And at another day, to wit:

THURSDAY, *March* 25, 1880.

This cause was this day further heard upon the transcript of the record of the decree aforesaid and the arguments of counsel, and continued until to-morrow.

And at another day, to wit:

FRIDAY, *March* 26, 1880.

This cause was this day fully heard upon the transcript of the record of the decree aforesaid and the arguments of counsel, but, because
119 the court here is not yet advised of its decree to be pronounced in the premises, time is taken to consider thereof.

And now at this day, to wit:

At a supreme court of appeals held at the State court-house, in the city of Richmond, on Thursday, November 25 1880 (being the day and year first herein mentioned).

Came again the parties by their counsel, and the court having maturely considered the transcript of the record of the decree aforesaid and the arguments of counsel, is of opinion for reasons stated in writing and filed with the record (see No. 5) that there is no error in the said decree. It is therefore decreed and ordered that the same be affirmed and that the appellant, out of the estate of his testator in his hands to be administered, pay to the appellee thirty dollars damages and its costs in this behalf expended.

Which is ordered to be certified to the said chancery court of
120 the city of Richmond.

And afterwards, to wit, at a supreme court of appeals held at the State court-house, in the city of Richmond, on Friday, December 3rd, 1880,

This day came the appellant and filed a petition praying for a rehearing of the decree pronounced herein on the 25th of November, 1880, and the court not being advised of its judgment to be given on said petition, time is taken to consider thereof. (See No. 7.)

And afterwards, to wit:

THURSDAY, *February* 17, 1881.

Came the parties by their counsel, and the court having maturely considered the petition of the appellant for a rehearing of the decree

pronounced herein on the 25th of November, 1880, and no one of the judges who concurred in that decree being dissatisfied with it, or desiring such a rehearing, it is ordered that said petition be denied.

121 VIRGINIA,

City of Richmond, to wit:

I, George K. Taylor, clerk of the supreme court of appeals of Virginia, holden at Richmond, Virginia, do hereby certify that the foregoing printed and manuscript record contains the record and proceedings, with all things concerning the same, in the said supreme court of appeals of Virginia, holden at Richmond aforesaid, in the cause lately depending in said court under the style of Vial's Executor against The Mutual Assurance Society of Virginia against Fire on Buildings as appears from the records in my office.

In testimony whereof I hereto set my hand and annex the seal of the said court this 28th day of September, 1881.

[SEAL.] GEO. K. TAYLOR, *C. C.*

122 Know all men by these presents, that we W. Goddin, executor of S. P. Vial, dec'd, and Wellington Goddin are held and firmly bound unto The Mutual Assurance Society of Virginia in the full and just sum of two hundred and fifty dollars, to be paid to the said The Mutual Assurance Society of Virginia, it' certain attorneys, executors, administrators, or assigns, to which payment, well & truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents. Sealed with our seals and dated this 2nd day of June, in the year of our Lord one thousand eight hundred and eighty-one.

Whereas lately at a session of the supreme court of appeals of the State of Virginia, in a suit depending in said court between Wellington Goddin, executor of S. P. Vial, deceased, appellant, and The Mutual Assurance Society of Virginia, appellee, a decree was rendered against the said appellant, and the said appellant having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the decree in the aforesaid suit, and a citation directed to the said The Mutual Assurance Society of Virginia citing and admonishing it to be and appear at a Supreme Court of the United States, to be holden at Washington the second Monday of October next:

Now, the condition of the above obligation is such that if the said Wellington Goddin, executor of S. P. Vial, deceased, shall prose-
123 cute said writ of error to effect, and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

W. GODDIN. [SEAL.]
Ex'or of S. P. Vial, dec'd.

Sealed and delivered in presence of—

WELLINGTON GODDIN. [SEAL.]

Approved by—

M. F. PLEASANTS. [SEAL.]
Clerk U. S. Circuit Court Ea. Dist. Va.

Approved June 14, 1881.

M. R. WAITE, *Chief Justice.*

STATE OF VIRGINIA,

City of Richmond, to wit:

I, George K. Taylor, clerk of the supreme court of appeals of Vir-

ginia, holden at Richmond, in said State of Virginia, do hereby certify that the foregoing is a true copy of a bond the original of which is filed in my office.

Given under my hand this 28th day of September, 1881.

GEO. K. TAYLOR, *C. C.*

124 UNITED STATES OF AMERICA, *ss:*

[SEAL.] The President of the United States of America to the honorable the judges of the supreme court of appeals of the State of Virginia, greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said supreme court of appeals, before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Wellington Goddin, executor of S. P. Vial, deceased, appellant, and The Mutual Assurance Society, of Virginia, appellee, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States; and the decision was in favor of such their validity; or wherein was drawn in question the construction of a

125 clause of the Constitution, or of a treaty or statute of or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened, to the great damage of the said appellant, as by his complaint appears: We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the fourteenth day of June, in the year of our Lord one thousand eight hundred and eighty-one.

JAMES H. MCKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—

M. R. WAITE,
Chief Justice U. S.

126 STATE OF VIRGINIA,
City of Richmond, to wit:

I, George K. Taylor, clerk of the supreme court of appeals of Virginia, holden at Richmond, in said State of Virginia, do hereby certify that a true copy of the within writ is filed in my office with the papers of the cause of "Vial's Executor against The Mutual Assurance So-

ciety of Virginia, against Fire on Buildings, which cause was lately pending in said court.

Given under my hand this 28th September, 1881.

GEO. K. TAYLOR, *C. C.*

127 The United States of America to The Mutual Assurance Society of Virginia, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of appeals of the State of Virginia, wherein Wellington Goddin, executor of S. P. Vial, deceased, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the decree rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this fourteenth day of June, in the year of our Lord one thousand eight hundred and eighty-one.

M. R. WAITE,
Chief Justice, U. S.

128 (Indorsed:) Wellington Goddin, ex'or, vs. The Mutual Assurance Society of Va. Original citation.

Executed in the city of Richmond, Va., June 17, 1881, on the Mutual Assurance Society of Virginia, by delivering a copy of the within citation to H. A. Claiborne, principal agent of said society, he being of the city of Richmond, Va., in which is located the principal office of the society.

P. P. WINSTON, *Deputy*
For JOHN W. WRIGHT,
Sheriff of the City of Richmond, Va.

On this 18th day of June, in the year of our Lord one thousand eight hundred and eighty-one, personally appeared P. P. Winston before me, the subscriber, a person well known to me, and makes oath that he delivered a true copy of the within citation to H. A. Claiborne, principal agent of the Mutual Assurance Society of Virginia, on the 17th June, 1881.

P. P. WINSTON.

Sworn to and subscribed the 18th day of June, A. D. 1881, by P. P. Winston.

J. LEAPPERSON,
Not'y Public.

STATE OF VA.,
City of Richmond, to wit:

I, George K. Taylor, clerk of the supreme court of appeals of Virginia, at Richmond, hereby certify that a copy of the within citation, with the endorsements and return thereon, is filed in the papers of the cause of Vial, ex'or, against The Mutual Assurance Society of Virginia against Fire on Buildings, which cause was lately pending in said court.

Given under my hand this 28th September, 1881.

GEO. K. TAYLOR, *C. C.*

129 VIAL'S EXE*C*'R
vs.
MUTUAL ASSURANCE SOCIETY OF VIRGINIA.

GRAME'S EXE'R
vs.
MUTUAL ASSURANCE SOCIETY OF VIRGINIA.

Opinion of Christian, J.

These two cases were heard together. They involve substantially the same questions. The first is before us on appeal from a decree of the chancery court of the city of Richmond; the second is brought up by a writ of error to a judgment of the circuit court of the city of Richmond.

They are cases of large importance, not only on account of the amount involved, or which may be involved in our decision, embracing the losses incurred by the burning of the very heart of this city at the disastrous fire occurring on the day of the evacuation of Richmond, causing the destruction of property to the amount of millions of dollars, but are also important in the character of the legal questions which arise upon the pleadings and the evidence in the cases before us.

Evidence.

130 The arguments of the counsel on both sides were most elaborate and able, and displayed great industry, research, and learning, and the court has given to these cases the careful consideration which their magnitude and importance demand.

I proceed now to give my own views and the conclusions which my mind has reached after a careful review of the arguments of counsel and the numerous authorities cited by them.

There are, however, certain preliminary questions raised by the assurance society which require a brief notice before the main question is considered. The assurance society relies as a ground of defence upon the fact that no formal notice was given to it of the fire, and of the losses consequent thereon.

I think this is no valid ground of defence. A fire of such magnitude and so notorious, burning out the heart of the capital city of the Confederacy, in which city the assurance society had its principal office, must have been well known to the society, as it was to the whole world, and no formal notice was required to be given of the fact of the occurrence of such fire.

131 But, in point of fact, the Mutual Assurance Society waived notice by declaring, from the very first moment when the claim of the appellant and of the plaintiff in error was preferred against them, that they were protected against all such claims by a positive provision in the policies which they had issued, exempting them from all responsibility caused by fire on the occasion on which the buildings in these cases were consumed.

Their denial of all responsibility for loss, as soon as the claim for loss was asserted, upon the ground that they were released by the very terms of their policy from any loss occasioned by such a fire, was plainly a waiver of notice of the fact of the fire and the losses consequent thereon.

In the case of Grame's Exe'r vs. The Mutual Ass. So't., the defence was raised by the society that the plaintiff was estopped in the assertion of his claim of loss by fire by the fact that John Grame, the plaint-

iff's testator, erected other buildings upon the lot on which his burnt buildings stood, and insured them in the office of the defendants,
132 and was allowed a credit for part of his premiums paid upon the former buildings.

I am of opinion that the payment of these premiums did not work an estoppel against John Grame, or his executor, so as to prevent the assertion of his claim for loss by fire on the buildings which had been destroyed before the erection of the new buildings on the same lot. He might well desire an insurance upon these new buildings in the same society in which he was assured in the old buildings which had been destroyed; and the mere fact that he procured insurance on the new buildings and was allowed credit for part of the premiums paid upon the old buildings did not esstop him from the operation of his claim against the society for the loss of the latter.

Having disposed of these preliminary questions, I come now to consider the main and important question, whether the Mutual Assurance Society is exempted from liability by the provision incorporated, in accordance with the rules and regulations of the society, in all the policies which it issued made in pursuance of the statute law (which
133 statute law is the source and charter and foundation of all its power and authority), the provisions of which are in the following words:

Sec. 11. "Buildings insured by this society are only insured against such losses or damages as may be occasioned by accidental fire or by lightning."

Sec. 12. "No policy whatever which may be issued shall bind the society to answer for losses which may result from riots, civil commotions, or insurrections, from the invasion of a foreign enemy, from hurricanes or earthquakes, or from the direct or indirect agency of the proprietor of the building which may be burnt."

These two sections of the statute which, by its express terms, fixes and defines the contract which the assurance society enters into with all its policy-holders, to wit, the 11th and 12th sections, both affirmatively and negatively declare for what liability the assurance society will be bound, and for what liability it will not be bound. Section 11 is an affirmative declaration on the part of the assurance society that it will stand bound for losses or damages caused by accidental fire or by lightning, in which affirmative declaration this emphatic
134 language is used: "Buildings insured by this society are only insured against such losses or damages as may be occasioned by accidental fire or by lightning."

Section 12 declares negatively for what losses or damages the assurance society will not be responsible, and is expressed in this plain and emphatic language: "No policy whatever which may be issued shall bind the society to answer for losses which may result from riots, civil commotions or insurrections, from the invasion of a foreign enemy, from hurricanes or earthquakes, or from the direct or indirect agency of the proprietor of the building which may be burnt."

Now these two sections of the statute, which are embraced in every policy issued by this society, contain the contract of the parties dealing with it, and upon these alone the liability of the assurance society must rest.

The terms of this contract fixing the liability of the assurance society are to my mind plain, simple, unequivocal, and certain. The company has declared, in unmistakable terms, to be responsible only for
135 losses or damage "occasioned by accidental fire or by lightning."

It has declared in equally plain and unequivocal terms that it will not be responsible for losses or damage which may result from riots, civil commotions, or insurrections, or from hurricanes, earthquakes, or from the direct or indirect agency of the proprietor of the building which may be burnt."

Now we have to enquire what were the facts and circumstances under which the buildings in these causes were burned, and for which burning it is now sought to hold the assurance society responsible. Let the record speak for itself. I file herewith the affidavits containing all the facts occurring on that historic and fatal day, long to be remembered, the 2nd April, 1865. The first is an affidavit of Jas. A. Scott, which is as follows:

"That for many years prior to the late war he was engaged in the tobacco business in the city of Richmond; that during and at the close of the war he was interested in the ownership and control of a large amount of leaf tobacco, and that he had for a long while been a member of the city council of Richmond; that when it was understood
136 on Sunday the 2nd April, 1865, that the city was to be evacuated by the Confederate Government upon the approach of the United States forces, he was appointed by the council of the city one of a committee to meet the enemy and surrender the city; that some time after midnight, on the morning of the 3rd April, 1865, he, in company with other members of the committee, and with Judge John A. Meredith and Judge William H. Lyons, who had been requested by the council to act with the committee, and with Joseph Mayo, esqr., mayor of the city, went out to meet the enemy and surrender the city; that, having taken a position and awaited their arrival, the party after awhile were met by the enemy, when a formal surrender of the city was made; that this was about two miles from the corporation line on the Osborne Turnpike, near the James River; that the Federal commander stated on the occasion to Mr. Mayo, the mayor, that he would at once send a party forward to destroy all the liquor in the city before the arrival of the main body of troops, when he was informed by Mayor Mayo that his action had been anticipated by the city council, who had already had everything of the kind destroyed; that on returning
137 towards the city, and when about a mile and a half distant, upon an elevated point of the road, he saw that the tobacco warehouses in the city were on fire, and among them the two belonging to his mother, situated on 21st street, in which a large amount of tobacco was stored. This was about sunrise. The morning was calm and bright. Some time afterwards the wind arose from the southeast and blew strongly across the city, and the whole city was in great danger of conflagration thereby. That on taking possession of the city the United States army did not seize any tobacco belonging to private persons, so far as this affiant ever knew or heard. He and his brother-in-law, Mr. Clark, were fortunate enough to save some $10,000 worth of tobacco by having it stored in a house distant from the warehouses, although they gave a list of it with their other tobacco to the Confederate Government in due time for its destruction. This tobacco, some two or three weeks after the capture of the city, with the full knowledge of the officers of the United States army, Mr. Clark and himself shipped at the dock in a schooner via New York for Liverpool and London, re-
138 ceiving astonishingly large prices therefor. Other citizens of Richmond, owners of tobacco, sold it here and elsewhere without molestation from the Federal Government, which, so far as this affiant

ever heard, never troubled any tobacco in Richmond except that which belonged to the Confederate Government.

(Signed) "JAS. A. SCOTT."

And there was introduced the statement of Col. Ewell, which is as follows:

"Statement of Colonel Benj. S. Ewell, a member of General Ewell's staff, in relation to the burning of Richmond in 1865, made November 5th, 1873.

"Shortly after the capture of Savannah by General Sherman a law was passed by the Confederate Congress requiring military commanders to destroy all articles of value within their commands rather than let them fall in the hands of the hostile forces. A month or two before the evacuation of Richmond General Lee sent a notice to General Ewell of this law, with directions that steps be taken to carry it out should it become necessary to give up the city. It was suggested that, to prevent risks as far as possible of a general conflagration, the city authorities be at once consulted, and the articles to be destroyed (tobacco, of which there was a large quantity in the city, and which could only be destroyed at short notice by firing, was especially mentioned) stored in isolated buildings. General Ewell had frequent consultations with the mayor and other city authorities, and with the holders of the tobacco, which resulted in the selection of certain warehouses from which the flames would not, it was thought, spread should it become necessary to apply the torch for the purpose of destroying the tobacco they contained.

"Every step was taken by General Ewell to prevent disastrous results in the event of executing the order. It was a matter that gave him much anxiety, and to which he gave much time and attention. The final orders were given on the night of the evacuation of the city by the Confederate forces by General Ewell, he acting under the commands of his military superiors, to apply the torch, and it was done about daybreak on Monday morning. The fire spread rapidly, partly by the neglect of the fire-brigade and partly by incendiaries;
139 soon the wind from the southeast became brisker, and the entire city—the flames began at the southeast—was in imminent danger of falling a prey to the advancing conflagration. It was checked about 1 o'clock p. m. of Monday, principally by the exertions of the division of the United States Army that belonged to the command of General Wetzel, and which first entered the city. To the credit of this officer it ought to be known that when his command, consisting of two divisions, one white, the other colored troops, the latter being in front, approached the city he changed the order of his march and put the white soldiers in front when he saw the fire, as being less likely to commit excesses, and being more skilled and experienced in extinguishing fires. This is the substance of my knowledge of the burning of the city.

"BENJ. S. EWELL."

The only additional evidence is that contained in the statement of Maj. Carrington, who was the provost-marshal of the city of Richmond, which statement is as follows:

"I am requested to state my knowledge of facts connected with the fire of April 3, 1865, in the city of Richmond. I was at that date pro-

vost-marshal of the city, under the appointment of secretary of war of Confederate States. I reported to General Ewell, as my commanding officer, in all matters relating to the city. Some weeks before the evacuation of Richmond General Ewell sent for me and informed me that he had orders to destoy all tobacco, cotton, and military and naval stores in the city in the event that its evacuation became necessary. He instructed me to make enquiry as to the amount and location of these articles in the city. I soon after reported to him that there was no considerable quantity of any of these articles excepting tobacco, of which there was a large quantity.

"General Ewell took steps for having the leaf tobacco in the city, as far as possible, kept in Shockoe warehouse, and in Von Gronin's warehouse, on Cary street, and in the warehouse at the Petersburg depot. We had frequent conversations on the subject, in which he deplored the necessity for executing the order, and expressed the hope that it could be avoided.

"On Sunday, April 2, 1865, General Ewell sent for me, informed me that the city must be evacuated, and directed me to prepare for burning the warehouses aforesaid, but not to apply fire until the last moment.

140 "I sent officers to these three warehouses, with orders to prepare combustibles in such manner that they could be quickly fired, and to place a sufficient guard at each to prevent any disturbance. I also sent an officer to communicate with the chief of the fire department of the city to inform him of the location of fire, and to request him to have the firemen and their engines on the ground to prevent the spread of the flames. The officer reported that he had communicated with the person second in authority, the chief of the fire department being out of the city. During Sunday night I was several times at the office of the secretary of war (General Breckinridge). I recollect that I informed him of the orders I had received and of the action I had taken. He said that it was a necessity; that the orders must be carried out, with all precautions taken to prevent a spread of the fire.

"My final orders from General Ewell were to remain in the city as long as I could with safety and to preserve order, as far as possible, with the troops under my command, and to fire the tobacco before I left. General Ewell and General Breckinbridge left the city together, by way of Mayo's bridge, about or a little before daybreak of Monday, 3rd of April. I parted with them at corner of Fourteenth and Cary streets, as they rode off. General Ewell said to me just as he left that the firing of the tobacco could not be longer delayed. I gave the orders to two of the men with me, and they at once communicated them to the officers on guard at the warehouses. The fire was applied at once at Shockoe and Von Gronin's warehouses. The officer at the warehouse at the Petersburg depot sent me word that a number of wounded Confederate soldiers had been laid in the warehouse, and that they could not be removed. I directed the combustibles collected at that place to be removed, and countermanded the order for burning it.

"The night was remarkably still. I remarked the fact, several times during the night, that there was not a breath of air stirring. Very soon after the warehouses were fired, the wind rose from the southeast, and in a short time quite a breeze was blowing from that direction. I left the city just about sunrise on Monday morning by the river road, or plank road, going up the river.

"ISAAC H. CARRINGTON."

The action of these officers was in accordance with military orders received by them, and these orders were in accordance with an
141 act of Congress of the Confederate States of America, passed March 17th, 1862, entitled "An act to regulate the destruction of property under military necessity, and to provide for the indemnity thereof," (see Statutes at Large Confederate States of America, 1st Congress, p. 2), which provides as follows: "The Congress of the Confederate States of America do enact that the military authorities of the Confederate army are hereby authorized and directed to destroy cotton, tobacco, military, and naval stores or other property of any kind whatever which may aid the enemy in the prosecution of the war, when necessary to prevent the same, or any part thereof, from falling into the hands of the enemy."

From the evidence quoted, and the act of congress above referred to, it is plain that this fire from which the appellant's buildings were burned resulted from the act of these military officers, acting under express orders and by virtue of an act of Congress of the Confederate States of America.

Certainly it cannot be said that the fire which consumed the buildings of the appellants was an accidental fire or a fire by lightning.

The question is, how did such fire result, and how was it occa-
142 sioned? If it was occasioned by accident or by lightning the company is responsible. It is not responsible if occasioned by or resulted from riots, insurrection, civil commotion, or the invasion of a foreign enemy.

It is argued with much ingenuity that the burning in the case was not caused by the enemy, but that in fact the enemy put out the fire, and labored to prevent its spread; but still the question ever recurring is, what caused the fire, who applied the torch, and how did the conflagration spread? The torch was applied by the military authorities, acting under orders from the government then established and recognized as the Government of the Confederate States of America. No man can say, reading the facts of this case, that that fire which consumed the heart of the city was an accidental fire, but must conclude that it was a fire which originated and was caused by and resulted from the acts of military power which the assurance society had nothing to do with and over which they had no control.

It is plain that the assurance society never intended to insure
143 buildings against loss or damage by fire when such loss was occasioned by a power over which they had no control and could not resist. Is it possible that with the careful and guarded language by which this society expressed its contract, using every term that it was possible to use to express its unwillingness to insure against any loss by fire except what was merely accidental, that it can now be held that a fire originating from the agents and officers of a military power over which the society had no control will bind the society against the express stipulation of their contract? Now, I repeat, what is that contract? Affirmatively the society declares that it will insure against all losses caused by accidental fire or by lightning. Negatively it declares that it will not insure against losses or damage "which may result from" riots, civil commotions, or the invasion of a foreign enemy.

Now, the burning in this case was not accidental, but the evidence shows that it was in consequence of the invasion of the city by the Federal army.

144 Unquestionably the company intended to protect itself against all losses except by accidental fires, and in their contract of in-

surance, they used terms that would seem to embrace every conceivable condition of affairs except accidental fire. I suppose that "civil commotion" must necessarily arise when there is civil war. It is true there may be civil commotion without civil war, but certainly there cannot be civil war without civil commotion, and I think that no man who lived in the last decade would say that there was no civil commotion between 1861 & 1865.

But the company not only protected itself against liability for loss occasioned by riots, insurrection, and civil commotions, but against the "invasion of a foreign enemy."

In the light of history and of facts familiar to every man who opens his eyes and see material facts before him, is it not plain that the late war was a war of invasion and that it was the invasion of an enemy, and that it was the invasion of a "foreign enemy?"

The United States of America was in arms against the Con-
145 federate States of America. The United States was as foreign to the Confederate States as Great Britain or France or Russia.

The Confederate States of America was an organized government with all its departments, army & navy, & congress, & courts, with ministers abroad, and a complete and powerful government; and, as was said by Mr. Justice Nelson in the case of Mauran vs. Insurance Co., 6 Wallace, p. 14, it was "a government in fact—was erected; greater in territory than many of the old governments in Europe; complete in the organization of all its parts, containing within its limits more than eleven millions of people, and of sufficient resources in men and money to cary on a civil war of unexampled dimensions."

This court has reaffirmed what Mr. Justice Nelson so well said, and it is only necessary to refer to the able opinion of Judge Staples in Newton vs. Bushong, 22 Gratt,, & Walker vs. Beauchler, 27 Gratt., in which Judge Staples, speaking for the whole court, in strong and pertinent language affirmed that the Confederate States of America

was a government, clothed with all the insignia of a govern-
146 ment de facto, if not de jure. In the last-named case Judge Staples uses this emphatic language, concurred in by the full court: "Whatever may be the diversity of opinion in respect to the validity of acts done under the authority of the Confederate Government, there is one proposition, certainly, as to which the courts are now generally agreed; that is, that the late war between the two sections was a civil war in the most literal and comprehensive sense of the term, and was attended by all the incidents and consequences of a war between independent nations.

And in Brown vs. Hiatts, 15 Wall, 177, Mr. Justice Field, speaking on the same subject, says: "It is sufficient to state that the war was accompanied by the general incidents of war between independent nations; that the inhabitants of the Confederate States, on the one hand, and of the loyal States, on the other, became thereby reciprocally enemies to each other, and were liable to be so treated."

Now, many authorities and opinions might be quoted to the same effect, but I think these already referred to are sufficient to show that the Confederate States of America were, certainly as long as the war lasted, a separate and independent government, and foreign to the United States of America.

147 When therefore the assurance society stipulated that they would not be responsible for loss or damage which might result from the invasion of a foreign enemy, such stipulation protected them

against loss which was directly consequent upon the invasion of the United States, which was a foreign enemy to the Confederate States.

This proposition is to my mind too plain for argument. The stipulation is that the company will not be responsible for loss or damage which may result from the invasion of a foreign enemy. Certainly there was an invasion of this capital city of the Southern Confederacy by the most powerful armies that were ever marshalled in modern times. It was an invasion of an enemy, and not of friends; of an enemy bent upon the destruction and subjugation of these Southern States, of which Richmond was the capital. It is equally clear that it was the invasion of a foreign enemy, as foreign to the Confederate States as England or France or Russia. Certainly, if the Confederacy had been established, it would have been recognized as a separate and independent nation—foreign to the United States and foreign to all other powers.

Now the facts already cited show conclusively that this fire re-
148 sulted from the invasion of this city. It was caused by the military orders executed under the statute requiring all property such as cotton and tobacco and naval and military stores to be burned at the approach of the enemy. The destruction of such property is one of the means of defense which every nation has a right to use, and is as legitimate as any other means of warfare. For instance, the burning of Moscow was an efficient means of repelling the invader, and the army of Napoleon was destroyed by that act more completely and disastrously than by a hundred battles.

And so, in the case before us, the destruction of the property ordered to be burned by the military authorities was a means of repelling the invader, and was directly consequent upon the invasion. In other words, the fire was directly caused by and was in consequence of the invasion. If there had been no invasion there would have been no fire. The fire resulted, therefore, directly from the invasion.

I am, therefore, of opinion that the stipulation in the policy protects the company, and that it is not responsible for any loss or damage occurring from such a fire.

149 A contract of insurance, like all other contracts, must be construed according to the plain meaning and intention of the parties. It would be strange, indeed, that this society so carefully guarding its liability, and using every conceivable term to protect itself, should now be held liable for loss and damage growing out of a civil war because it did not use the term "civil war," but in fact used all other terms to show that it would not be responsible for loss or damage caused by a power over which it had no control.

To hold the company responsible in this case would be to say that although it sought to protect itself against all loss and damage which might result from riots, insurrections, civil commotions, or the invasion of a foreign enemy, earthquakes, &c., it yet held itself bound for loss or damage occasioned by a civil war consequent upon the secession of the Southern States of the Union from the United States.

In my opinion it is plain that the society is not bound and has protected itself by the very terms of the contract which it made with all its policy-holders in plain and unequivocal language, by which it affirmatively declared that it would only insure against accidental
150 fire, and negatively declared that it would not insure against loss or damage which might result from riots, insurrections, civil commotion, the invasion of a foreign enemy, hurricanes, earthquakes, &c.

But it is insisted by the learned counsel for the appellant that the

case of Portsmouth Insurance Co. vs. Reynolds, 32 Gratt., p. 613, must govern this case.

I dissented from the opinion of the majority in that case and the president of the court concurred in my view.

I do not think that the principles of that case can in any way affect the decision of the case now before us. The stipulation of the policy in that case was that the company should "not be liable to make good any loss or damage by fire, which may happen or take place by means of any invasion, insurrection, riot, or civil commotion, or of any military or usurped power."

I was of opinion that the company ought to be relieved because the fire was certainly caused by civil commotion or military power.

151 But the court held the company responsible upon the ground that the United States Government was not then a foreign government or an enemy in arms against the State of Virginia or the Confederate States of America, but that they had the right to enter upon and take possession of property which was their own, and to destroy it if they thought proper.

The great stress of the opinion is laid upon the fact that at that time the State of Virginia had not seceded and that in no sense could the United States Government be regarded as an enemy to the State of Virginia. In the able opinion of Judge Burks, he is cautious to show that at that time no vote had been taken by the people of Virginia upon the ordinance of secession, and he very properly argued that the United States Government was not then in open war against Virginia, and that, in fact, the Southern Confederacy had not been established, and that in no sense could the United States be said to be invading the State of Virginia, but was only exercising its authority to enter upon and destroy its own property.

152 The case before us is very different. Here we have a case of an established government, with all the insignia of a government de facto, if not de jure, exercising its authority over eleven States, embracing eleven millions of people, with a government firmly established, with a president and congress & courts, and an army and navy, and which carried on a war of the largest proportions in modern times.

Certainly, according to the facts of history, if the United States, as was said in the case of Portsmouth Insurance Co. vs. Reynolds, supra, did not constitute an invasion of the State of Virginia, yet in the year 1865, it must be conceded that there was an invasion by the United States Army of this capital city of the Southern Confederacy, and that that invasion was the invasion of a foreign enemy, as foreign as if the armies had been led by England or France or Russia or any other foreign power.

Upon the whole case I am of opinion that the judgment of the circuit court of the city of Richmond and the decree of the chancery court of the city of Richmond should be affirmed.

Copy.

STATE OF VIRGINIA,
City of Richmond, to wit:

153 I, George K. Taylor, clerk of the supreme court of appeals of Virginia, holden at Richmond, do hereby certify that the foregoing is a true copy of the opinion of said court, delivered in the causes lately pending in said court, styled "Vial's Ex'or against The Mutual Assurance Society of Virginia against Fire in Buildings,"

and "Graeme's Executor against The Mutual Assurance Society of Virginia against Fire in Buildings."

Given under my hand this 28th September, 1881.

GEO. K. TAYLOR, *C. C.*

(Indorsed:) Supreme court of appeals of Virginia. Opinion. Christian, J. (Copy.) For record. (No. 5.)

(Indorsed:) Sup. Court U. S., 1881, October term. No. 1049. Grame's Ex'or vs. Mut'l Ass'ce Society of Va., and 1050, Wellington Goddin, ex'r of Nelson Vial, pl'ff in error, The Mutual Assurance Society of Virginia. Certified copy of opinion. Filed 15th Oct'r, 1881.

154 Supreme court of appeals of Virginia.

Anderson, J.—Dissenting opinion.

VIAL'S EX'OR
v.
MUTUAL ASSURANCE SOCIETY OF VA.

This is a suit by the executor of Seymour P. Vial against the Mutual Assurance Society of Virginia, to recover three policies, amounting to $29,000 300, on buildings in the city of Richmond which were insured by said company against fire & lightning, and which were totally destroyed by the great fire of 3rd of April, 1865.

The company resists the claim upon various grounds, some of which involve the merits of the claim, and others of a technical character, which, impliedly admitting the justice of the claim, seek to avoid it upon other grounds. The court being unanimously of the opinion that the defence cannot be maintained upon these latter grounds, I will proceed at once to consider the case upon its merits.

In all of these policies only four-fifths of the value of the buildings are insured. Each policy contains a covenant on part of the Mutual Assurance Society of Virginia "to pay to the assured, Seymour P. Vial, or his heirs, executors, administrators, or assigns, all such losses or damages as shall happen by fire or lightning (in a given period) to the above-mentioned buildings according
155 to the true intent and meaning of the said acts of the legislature of Virginia, and the constitution, rules, and regulations of the said society aforesaid." It will be observed that the covenant is to indemnify the insured against all such losses or damages as shall happen by fire or lightning to the buildings mentioned, according to the true intent and meaning of the acts of the legislature, and the constitution, rules, and regulations of the society. By an act of the general assembly, passed 22nd of December, 1794, authorizing the formation and incorporation of said company, the inducements to the formation of the Mutual Assurance Society against Fire on Buildings of the State of Virginia are set out in section 1 as follows: "From the great and frequent losses sustained by the ravages of fire, it is advised expedient to adopt some mode to alleviate the calamities of the unfortunate who may suffer by that destructive element." And, by section 2, the principles on which the society is to be formed are declared to be, "that the citizens of this State may insure their buildings against the losses and damages occasioned accidentally by fire, and that the insured pay
156 the losses and expenses, each his share, according to the sum insured." This is no new principle in insurance societies. Is it

not the case in all insurance companies that the insured pay the losses? If they are paid at all, they do. And for that purpose premiums are paid and quotas collected. Subsequent sections provide for raising a fund and investing it, so that the ordinary losses may be met by the interest on it.

As soon as the sum of three millions is subscribed this section also provides that the society is to be organized. And, by section 3, it is incorporated under the name aforesaid, with the rights of succession, of sueing and being sued, pleading and being impleaded, &c., in its corporate name.

By Article X, section 11, of the constitution, rules, & regulations of the society, it is provided as follows: "Buildings insured by this society are only insured against such losses or damages as may be occasioned by accidental fire, or by lightning." It is contended by the defendant company that the before-recited provision in the act of assembly and this 11th section of the C. R. R. are a restriction upon the general terms in the policy as to losses or damages which shall happen by fire,
157 and limits it to such fires as are accidental. That would seem to be a fair construction. But it is important to ascertain what is meant by accidental fires. Surely the act of assembly was not designed to restrain the society within such narrow limits that it could not afford relief or alleviation to the calamities of the unfortunate who may suffer by the hand of the incendiary.

The language in section 2, that the citizens of this State may insure their buildings against losses occasioned accidentally by fire, I think must be construed accidental as to the insured; that it did not occur by his will or design; that it was accidental as to him; that he had no willful agency in it. If the fire was caused by an incendiary, or by any other means, which was without design or without agency on his part, it would be as calamitous to him, and his claims for alleviation would be as influential and as meritorious as if the fire had been the result of the merest accident.

Section 5 of the act, I think, shows what is meant by the expression in section 2, "occasioned accidentally by fire." It provides that
158 "they (the company) shall agree upon certain premiums to be paid by the persons who shall have their property insured at the time of such insurance, which shall be deposited and kept as a fund for the purpose of making immediate reparation to such persons as may sustain losses or damages by fire, after proof that the fire actually happened." The reparation to be made is for losses by fire. It doesn't say by accidental fire, or accidentally by fire. But the succeeding clause explains it. It adds, "unless it be proved that the proprietor of the buildings insured did wilfully occasion the fire, directly or indirectly." It means accidental as to the proprietors, but not as to others, and shews that he is to be paid for the loss unless the fire was wilfully caused by him. That is the only exception.

This is the construction placed on it, I think, by the company itself, as is shown by the latter clause of section 4, Article XIII, p. 24 of the C. R. & R. of the society, in which this language is used: "If the person entitled to the benefit of insurance shall not believe that the burning was entirely accidental as to others, he shall, notwithstanding,
159 make oath or affirmation that he was not himself, either directly or indirectly, the cause thereof; and in his affidavit shall state what he knows or believes with respect to the intentional burning by others." And such affidavit meets the requirements of the company.

In the case under judgment, the fire was entirely accidental as to

the proprietor of the buildings. He certainly had no agency, directly or indirectly, in causing it.

But the defendant company contends that it is exempted from liability for loss or damage by section 12 of said Article X. That section reads as follows: "No policy whatever which may be issued shall bind the society to answer for losses which may result from riots, civil commotions, or insurrections, from the invasion of a foreign enemy, from hurricanes or earthquakes, or from the direct or indirect agency of the proprietor of the building which may be burnt."

I am of opinion that this section, if it is not in conflict with the object and purposes of founding the association and the provisions of the charter, is a limitation and restriction upon the general undertaking of the company, on the face of the policy, to be liable for all such
160 losses as shall happen by fire to the said buildings of Seymour P. Vial; and that it is liable to the plaintiff for all losses and damages to the said buildings by fire which did not result from one or the other of the above-enumerated causes. The buildings were destroyed by fire. Was it the result of either of the above causes?

It seems to me that the contract should be construed according to the established rules and canons for construing contracts in general, and that there is nothing in the relations which existed between the plaintiff's testator and the corporation with whom he contracted which entitles the latter to the application of more favorable rules in the construction of its contract in this case than those which are applied in construing the contracts of other insurance companies. It has been held, and I think properly, that the rules of construction of contracts with mutual-insurance companies are not different from those applied in construing contracts with stock companies. And the Mutual Assurance Society of Virginia is but a mutual-insurance company, and
161 I can perceive no good reason for applying different rules of construction to its contracts with its assured than are applicable to contracts in general, because the insured in entering into the contract becomes a member of the society. His contract is with the corporation as a distinct person from the individual members who compose it; and by becoming a member, under its peculiar constitution and organism, he acquires no appreciable influence in directing or controlling its action and management. As between him and the party with whom he contracts there exists the same diversity of interest touching the contract that exists between parties to contracts in general. And when his insured buildings are destroyed by fire, or by lightning, his interests and those of the corporation, and indeed of the whole body of the society, become adverse.

I think this diversity and antagonism of interest is shown by the dealings of the company, in its endeavours to enforce its claims for arrearages in some instances not only against those who have voluntarily become members and liable by their own acts of volition,
162 but also against those who had never become members and liable for the arrearages by their own consent, but who had actually no knowledge of the existence of any arrearages, or of the liability of the buildings when they purchased and paid for them; and were constituted members of the society without knowing it, and in fact in total ignorance that there was such a society in existence. And in this case the company in their conduct of its defence does not seem to have acted differently from what is usual between parties litigant in the most strenuously contested cases, when either party is ready to take any advantage the law or rules of pleading may give him, though not neces-

sary to the attainment of the ends of justice, so that he may defeat his adversary. I allude, of course, to the earnest endeavors of the company to avoid responsibility in this case upon grounds which would defeat a trial on the merits, and upon grounds which we all hold to be untenable.

I do not mean by these allusions to cast any sort of censure
163 upon the company or its agents. By no means. I do not hesitate to say that in my opinion, so far as I have knowledge or belief in all these matters, the highly respectable constituted agents of the company have been actuated by a sense of duty to their company, as they understand it, and have acted with fidelity to their trust, though in some instances, as in those alluded to, they were mistaken as to the rights of the company and the liabilities of the adverse party. And for the purpose for which the reference is now made, the greater the fidelity it exhibits on part of the agents to their company, and the more their conduct is shown to be within the scope of their authority, the stronger it is in point to illustrate and establish my position, that the parties in this contest represent adverse and antagonistical interests and that there is no reason why different rules of construction of their contracts should obtain than those that are applicable to contracts in general.

These contracts were made, or were rather a reaffirmation, upon a revaluation of the buildings, of contracts which had been made
164 perhaps seven years or more before—the first on the 19th of February, 1856; the second on the 31st of December, 1858; and the third on the 19th of January, 1859. The paper exhibited by the company with its answer, purporting to be the constitution, rules, and regulations of the society, from which the citations have been made, shows on its title-page that they are set out "as amended and revised subsequent to the 19th of May, 1819, and in force on the 1st of October, 1856." But whether the section under consideration was in force prior to the 1st of October, 1856, does not appear so far as I have been able to discover. If it was not, it could not affect the contract of assurance of the 19th of February, 1856, it being prior thereto. But I shall consider the case as if it was then in force, and according to its terms, if the loss was the result of the causes enumerated, or either of them, it does not fall within the risks assumed by the company.

The first named is riots. There was no riot in Richmond from which the burning could have resulted. It is not claimed that the loss
165 was the result of a riot.

We are equally clear that it was not the result of civil commotion, which is the next in order, nor of insurrection, which next follows.

There was no civil commotion nor insurrection in Richmond when the fire occurred which caused the loss. The people of Richmond had been in resistance to the Government of the United States, but under an organized government of the States and of the confederacy of States which had successfully resisted for four years all the power of the United States Government in arms aided by the outside world, from which they recruited their armies and replenished their military stores. Richmond was a municipality of the State of Virginia, which was a member of the confederation of States to whose governments she was subordinate, and rendered rightful obedience; and unless these regularly organized governments, whether rightful or de facto, can in any proper sense be so denominated, the loss could not have been the result of civil commotion or insurrection. In

166 no sense of the terms was there any civil commotion or insurrection in Richmond when the fire occurred. There was in fact no resistance in the city to the Government of the United States. For it appears that before the warehouses were fired, which was the beginning of the fire, the municipality had sent deputies to the commander of the United States forces, offering to capitulate, and the capitulation, as well as we can learn from the record, was most probably accepted before the torch was applied—at any rate, there was no resistance of any sort to the Government of the United States or its army from the municipality of Richmond, or its people, when the warehouses were fired. Consequently the fire could not have been the result of civil commotion or insurrection in the city of Richmond. And we have seen that the resistance made by the organized governments of the State of Virginia and of the Confederate States to the invading armies of the United States, in defence of their nationality and of the liberties of the people, cannot in fact, without doing violence to the terms, be denominated civil commotion or insurrection.

167 The next in order is "the invasion of a foreign enemy."

Was it in contemplation by the parties when the contracts of insurance were reaffirmed in 1856, in 1858, and in January, 1859, that there might be a hostile invasion of the State of Virginia by an enemy of the United States? And was it their purpose and design to exempt the insurer from liability for loss by fire which should result from such an invasion? They evidently had no thought of such a contingency arising, or even that there would be a hostile collision between Virginia and the United States. If such a state of things had been contemplated, it is a reasonable presumption that the company would have stipulated that it would not be liable for losses resulting from war between Virginia and the United States, or between the States, or from an invasion of the State by a hostile army of the United States, or from civil war. If it had intended to stipulate against liability for losses by fire resulting from civil war, it would have been one of the enumerated causes, and its being omitted forces upon us the conclusion that it was not in the contemplation

168 of the company, that such a contingency could arise, and therefore it was not guarded against, for the company had the whole matter in its own hands. It could have inserted what it chose in the exemption clause, and only inserts resulting "from the invasion of a foreign enemy." It is a familiar rule of construction that words susceptible of different constructions should be taken most strongly against the party whose language is to be interpreted; and that the general and positive agreement should have effect, unless the exception clearly withdraws the case from its operation. And in the Portsmouth insurance case the law is laid down by Judge Burks thus, speaking for a majority of the court: "The loss by fire being admitted, the burden of proof is on the insurer claiming exemption from liability to show that it falls within the exceptions." 6 Rob. Prac., 73; Pelly v. Roy. Exch. Assa Co., 1 Burr., 347.

They had no thought of a civil war, or of a war between the States, and therefore did not stipulate against losses resulting therefrom,

169 but only against losses resulting from the invasion of a foreign enemy. In construing contracts words must have the sense in which the parties understood them, and the burden of proof is on the insurer claiming exemption from liability, to shew that they fall within the exceptions. Cushman v. United States Life Ins. Co., 6 Law Journ.,

p. 601; Portsmouth Ins. Co. v. Reynolds supra, citing 6 Rob. Prac., 73; Pelly v. Roy. Exch. Asso Co., 1 Burr., 347.

Was the invasion of the United States Army the invasion of a foreign enemy? It is argued with much force that it was not the invasion of a foreign enemy. However that may be, such an invasion was not in the mind of the insurer or the insured when the clause in question was penned and made a part of the constitution, rules, & regulations of the association, or when the contract in controversy was entered into.

In support of the position that it was not the invasion of a foreign enemy it is said, it is true that by the ordinance of secession Virginia declared that her relations to the United States Government were dissolved, and entered into a confederation with the other seceding States, and that she united with them
170 in the formation of a government for the confederacy, but the United States denied their right to secede and to dissolve their political relations with them. They denied that their relations were those of foreign nationalities. And they raised armies, and invaded the Confederate States to resist secession, and to maintain the authority of the Government of the United States. And the Confederate States raised opposing armies, and force was met with force, in the maintenance of their separate nationality, and in resistance to the power of the United States. The question as to the fact of the said States being absolved from their relations to the Government of the United States, and constituting a separate nationality independent of the United States, however we may regard the question of right, was, so to speak, in fieri, and had to be decided by the war which was then being waged between them. It was a civil war or a war between the States, or a foreign war, as was to be determined by the arbiter to which they had resorted. And that arbitrament being decided
171 in favor of the United States, and the Confederate States having failed to maintain their separate nationality and having yielded to the authority of the United States and abrogated their ordinances of secession, can it be said that the war through which they had passed was a foreign war, and that the invasion of the United States was the invasion of a foreign enemy? If not, the conclusion is inevitable that the cause of the fire does not fall within the exception.

I do not wish to be understood as prepared to maintain that as my view of the relations between the United States and the Confederate States. I hold that the Confederate States had a government, and that the fire was caused by the act of that government, and consequently was not the result in its legal sense of the United army invasion.

It is the established law of Europe and America, from an early period, that in construing contracts of insurance the proximate or immediate cause of the loss is that alone to which we can look. The maxim is, "In jura non remota causa, sed proxima spectatur." "It were infinite" (says Lord Bacon), cited by Judge Burks in Portsmouth Ins. Co. v. Reynolds, supra, "for the law to consider the
172 causes of causes, and their impulsions one of another; therefore it contenteth itself with the immediate cause, and judgeth of acts by that, without looking to any further degree." Brom's Legal Max., 217. That this is the law in Virginia, at least, we need look no further than the recent decision just referred to, and that in determining whether the cause of the catastrophe is proximate or too remote in a legal view, one of the most valuable criteria furnished by the authorities is, whether

any new cause has intervened between the fact accomplished and the alleged cause. The principle that "if a new force or power has intervened, of itself sufficient to stand as the cause of the misfortune, the other must be considered as too remote," is asserted in that case, and it is fortified by the following decisions of the Supreme Court of the United States: Ins. Co. v. Tweed, 7 Wall., 44–52; Milwaukee, etc., Railway Co. v. Kellogg, 94 U. S. R. (4 Otto), 469; Ins. Co. v. Transportation Co., 12 Wall., 199; Ins. Co. v. Seever, 19 Wall., 542.

173 That case was decided upon the principle that the immediate efficient proximate cause of the fire could only be looked to. The court say: "It would seem too plain to admit of dispute that the cause denominated in the law causa proxima, the direct, efficient, controlling, productive cause of the loss of the insured buildings, was the act of the Government of the United States in setting fire by its authorized agents to the ship-house. The fire originated by that act, it is agreed, was 'continuous.' The force set in motion by the hand that first applied the torch was uninterruptedly and unceasingly operative until all the buildings were destroyed, and the cause of the loss of all was the same, not less of the loss of the one last burnt than of the one first fired."

In this case, in like manner, it may be said, it would seem too plain to admit of dispute that the cause denominated in the law causa proxima, the direct, efficient, controlling productive cause of the loss of the insured buildings, was the act of the Confederate authorities in setting fire to the tobacco warehouses, unless the sudden rising of the wind soon

174 after the torch was applied may be regarded as a new intervening, independent, and efficient cause of the burning of the insured buildings, and that view has been presented with great force by counsel in argument, and it is supported with much reason. It was a perfectly still morning, not a breath of air was stirring, when the torch was applied to the warehouses, which had been selected by the military authorities, with the co-operation of the city authorities, on account of their isolation, and disconnection with the other buildings of the city, as depositories for all the tobacco which was in the city, so that it could be burnt if it should become necessary to prevent it falling into the possession of the enemy, with as little danger as possible to the safety of the city; for the military authorities were careful to use every precaution they could to avoid the destruction of city property, and but for the springing up of a strong wind from the southeast, soon after the torch was applied to the warehouses, I am clearly of opinion that the fire would not have extended or reached the in-

175 sured buildings. But whether the rising of the wind can be considered in itself as an independent and efficient cause which intervened between the firing of the tobacco warehouses and the catastrophe, or whether the firing of the tobacco houses was the immediate, proximate, and efficient cause of the burning of the insured buildings, it is immaterial to decide, for if either was the proximate and efficient cause, then the loss does not fall within the exception to the risk undertaken by the company.

In the Portsmouth insurance case, supra, it was contended that the navy-yard was fired by the lawful orders of the United States Government forces in consequence of threatened attack of the rebel forces of Virginia, and that this threatened attack of the usurping military force or power of Virginia was the preliminary and operative cause of the fire. And in this case it is in like manner contended that the invasion of the United States Army created a military necessity on part

of the Confederate authorities to burn the tobacco to prevent it falling into the hands of the enemy, and that consequently the invasion was the predominating and operative cause of the
176 fire. In that case the court said, "The United States Government may have been and doubtless was apprehensive of danger to the navy-yard and naval stores there, and this apprehension may have been the occasion or motive for destroying the buildings and stores, but the alleged threatened attack by the military forces of the State was not the cause in a legal sense of the destruction, or if it was, it was the remote not the proximate cause. There was an independent intervening cause sufficient of itself to account for the loss, and that cause was the act of the Government of the United States in setting fire to the government buildings." Upon that ground we held that the firing by the United States authorities not falling within the exception to the general undertaking of the insurance company to insure against fire, the said company was liable for the loss. It seems to me that in this case the same response should be made, and to be consistent must be made to the defendant insurance company, that the invasion of the United States Army was not the cause in a legal sense of the
177 destruction, or if it was it was the remote, not the proximate cause. There was an independent intervening cause sufficient of itself to account for the loss, and that cause was the act of the Confederate Government or its military authorities in setting fire to the tobacco warehouses. That was a well-considered case. There was a motion for a rehearing which was overruled, and I beg to refer to the able and lucid opinion of Judge Burks in support of the decision. If that decision was right, and I think it was, and that we were right in holding the Portsmouth Insurance Co. liable for the loss in that case, a fortiori the Mutual Assurance Company of Virginia should be held liable for the loss in this case.

This is the inevitable conclusion, unless by the terms of the contract, as earnestly and ingeniously contended by defendant's counsel, a different rule was established by the parties themselves. They argue that the company having used the terms "result from" instead of the words "happening," or "caused by," or "by means of," they intended that they should be exempted from loss, although the cause ex-
178 pressed in the proviso or saving clause should be the remote and not the proximate cause of the fire.

There may be many antecedent causes from which consequences may result, just as there may be causes proximate and remote of a given effect. And I am unable to perceive why the proximate cause of the fire only can be looked to as the cause of the fire, in a legal sense, when the terms "caused by," or "by means of," or "happening from," or "occasioned by," are used, but when the terms "result from" are used all or any of the antecedent causes may be looked to, whether proximate or remote. It seems to me that there is no natural or substantial difference in the import of said expressions; and that whilst the company stipulated to be exempt from liability for losses resulting from the causes enumerated, or either of them, it can only be understood as stipulating to be exempt from such losses as were the legal result of the cause.

But there is another view which strikes me as entitled to careful consideration and great weight in the determination of this cause,
179 and which might properly have been noticed earlier in this opinion. It is, that the proviso, or saving, which we have been considering, is inconsistent with the object and designs of this association

in its origin and formation, as shown by the act of incorporation, and that it is in conflict with section 5 of that act and with its general scope and design.

Section 1 shews what was the design and object in this language: "Whereas from the great and frequent losses sustained by the ravages of fire, it is advised expedient to adopt some mode to alleviate the calamities of the unfortunate, who may suffer by that destructive element." It would be as calamitous to the unfortunate sufferer if the fire was the result of riot, civil commotion, or insurrection, or of invasion by a foreign enemy, and not by his wilful act, as if it was occasioned by the hands of the incendiary, or in any other way accidental as to the proprietor. And the alleviation of the calamities of the unfortunate suffer from the ravages of fire was the object of the association in its origin and formation.

The means by which this was to be accomplished are set out
180 in section 2 in general terms. And it was, by citizens of this State associating themselves into a chartered society pledged to alleviate the losses or damages of the unfortunate by shareing them rateably with him by all the members of the association. This is more fully and particularly set out in sections 5, 6, & 7.

Section 5 has been hereinbefore recited, and provides among other things for raising a fund for repairing losses, and requires that immediate reparation out of such fund shall be made to a member of the society who may sustain losses or damages by fire after proof that the fire actually happened, unless it be proved that the proprietor of the buildings insured did wilfully occasion the fire directly or indirectly. Sections 6 & 7 make ample provisions for providing a fund for the purpose.

The express requirement of the 5th section of the act of incorporation is, that reparation shall be immediately made. To whom? To the member who has sustained losses by fire, out of the funds so raised, however occasioned; there is only one restriction—unless it was ac-
181 casioned by his wilful act, directly or indirectly. This is the only exception or saving. He is entitled to reparation by the charter of the company, which, being a member of the company, is his chartered right for his loss, whether the fire was the work of an incendiary, or the result of a riot, or of civil commotion or insurrection or the invasion of a foreign enemy, or of war of any kind, so that it was not occasioned by his wilful act, directly or indirectly. And this section only carries out the objects and design of organizing and chartering such a company, as are plainly set out in the 1st & 2nd sections in this its charter of incorporation; by virtue of which alone it has any authority or, in fact, existence; for the fire would be as calamitous to the unfortunate in either of the cases supposed as if it had occurred in the absence of such causes. Nor would it have been lawful for the society, under this act of assembly, to have withheld compensa-
182 tion from the unfortunate member who had sustained loss by fire because it resulted from riot, or civil commotion, or insurrection, or the invasion of a foreign enemy, because the act of incorporation requires the society to repair all losses caused by fire except when it is caused directly or indirectly by the wilful act of the insured, and makes no exemption of fires resulting from either of the above causes.

If so, it was not competent for the society to insert a provision in its constitution, rules, and regulations that it would not be liable for the losses by fire resulting from either of said causes. When this proviso

or saving was inserted in that instrument, I cannot find from an inspection of the record. It only appears that it was a provision of that instrument on the 1st of October, 1856. Whether it was engrafted into it before, and how long before, does not appear. But whenever it was, it seems to me it was without authority from the charter, and is directly in conflict with the 5th section of the act of incorporation, and contrary to the objects, design, and policy of the association in
183 its origin and formation. The general provision in the act authorizing the company to adopt such rules and regulations as they or a majority of the members may deem best, cannot alter this conclusion, because it is implied that the rules and regulations which they adopt will be consistent with the charter and the objects and design of the incorporation.

But if I am in error in this conclusion, and the company was authorized to make other exceptions than that which is made by the act of incorporation, and with which exception alone the insured is expressly authorized to receive and the company is required to make reparation for the losses he has sustained by fire, it seems to me most reasonable and just that the saving clause should be most strictly construed, as it is a restriction upon the objects, design, and policy of the association in its origin and in the act of its incorporation. It should not be extended by construction a hair's breadth beyond the strict letter to enlarge the exceptions and to restrict the general undertaking of the company. And if § 12, Article X, is construed with that strict-
184 ness, it is plain that the losses sustained by the plaintiff by the fire of April 3d, 1865, do not fall within either of the exceptions, and the company is liable to answer for his losses.

I have come to this conclusion from every view I have been able to take of this cause, not without careful and anxious consideration, impressed as I have been with its importance, and with a sense of a responsibility which rests upon every member of this court in its decision, and aware that this determination of the cause would throw upon a company which has been eminently useful to the public, and which public policy requires should be sustained as far as it can be consistently with its obligations and the rights of individuals, a heavy burden. But the burden must fall somewhere; and it is better, I think, and more consistent with the object and design in forming this assosiation, that it should be distributed amongst all the members, or charged upon the fund which has been raised for such purposes, to which the plaintiff's testator largely contributed for a long period in his lifetime
185 and the plaintiff since his death, than that it should be borne alone by the unfortunates. It was to alleviate just such calamities as these that the association was organized, and the burden is no heavier upon the society and no harder to bear that it occurred in time of war than it would have been if it had occurred in time of peace. And there is no discrimination made by the charter as to fires occurring in time of war and those occurring in time of peace, and by the rules and regulations of the society no such discrimination is made. They do not say that they will not be answerable for the losses by fire occurring when the country is in a state of war, or which may result from war; but when it results from an invasion of a foreign enemy, is the only allusion to war made in the saving clause.

Such a disaster might have occurred when there was no invasion of the State by any enemy, foreign or intestine. More destructive fires have occurred in other cities when there was no war; and who ever claimed or thought that the insurance companies should be relieved on account

of the extent of the fire and the greatness of the disaster? It seems
186 to me that it is peculiarly proper that the burden of this great loss should fall upon the society, rather than upon the unfortunate sufferers by the fire, upon the principles of its organization, which was to alleviate the calamities of the unfortunate sufferers from the ravages of fire, by the formation of a community of perhaps now over two thousand citizens to share the burden with the unfortunate, and thereby to lighten the calamity which otherwise would have fallen singly on him. Doubtless many of the sufferers in Richmond by the great fire of April the 3d had all they were worth invested in the buildings which were insured by this corporation for ⅔ of their value. And that in order to secure it to them and their descendants, and especially during the war had with much denial paid its requisitions which were necessary to keep alive their policies, by which, and the contributions of their associates, the fund was created or enlarged which was designed to alleviate the calamities of those members of the community who were so un-
187 fortunate as to suffer from the ravages of fire. These requisitions they complied with, with full faith in the assurance company that if their property was destroyed by fire the company would pay their polices. These quotas they would not—it may be presumed they would not—have paid if the company had made known their determination that they would not pay for losses by fire which were the result of war. And if such ground were taken by the corporation, it should have made no requisitions while the war was raging.

I am fully aware that the question of hardship can have no influence in forming the conclusions which a court must deduce from the law and the facts, but it is gratifying to know that if the decision were in favor of the insured, whilst it would bear heavily on the party against whom it is made it would be a relief to the other party of a burden which it would be a greater hardship on him to bear if the decision was against him.

Upon the whole, I am of opinion to reverse the decree with costs.

188 STATE OF VIRGINIA,
City of Richmond, to wit:

I, George K. Taylor, clerk of the supreme court of appeals of Virginia, holden at Richmond, in said State of Virginia, do certify that the foregoing is a true copy of the dissenting opinion delivered by Judge Anderson in the cause lately pending in said court under the style of "Vial's Executor against The Mutual Assurance Society of Virginia against Fire in Buildings."

Given under my hand this 28th September, 1881.

GEO. K. TAYLOR, *C. C.*

189 GRÆMES, EX'OR,
v.
THE MUTUAL ASS. SOC. OF VA.

This was an action of covenant, and was decided by the court, a trial by jury having been waived by the parties. The judgment of the court was exclusively upon the plea of estoppel, and not upon the merits, the court expressly declining to consider any other question.

This court is unanimously of opinion that the defence of estoppel was not maintained, and I am of opinion that upon the merits, for reasons given in Vail's Ex'or vs. The Mutual Assurance Society of Virginia, which I have just read, that the appellant was entitled to a judgment.

I am therefore of opinion that the judgment of the circuit court be reversed and annulled with costs, and that judgment be rendered by this court in favor of the plaintiff in error.

STATE OF VIRGINIA,
City of Richmond, to wit:

I, George K. Taylor, clerk of the supreme court of appeals of Virginia, holden at Richmond, in said State of Virginia, do certify that the foregoing is a true copy of the dissenting opinion delivered by Judge Anderson in the cause lately pending in said court under the style of Græme's Ex'or ag't The Mutual Assurance Society of Va. against Fire in Buildings.

Given under my hand this 28th September, 1881.

GEO. K. TAYLOR, *C. C.*

(Indorsed:) Court of appeals of Va. Grame's Ex'or vs. The Mutual Assurance Society of Va. Dissenting opinion of Judge Anderson. No. 6. Filed with petition for writ of error.

(Indorsed:) Supreme Court U. S. 1881, October term. Nos. 1049 & 1050. Robert Grame, ex'c'r, &c., pl'ff in error, vs. The Mutual Assurance Society of Virginia, and Wellington Goddin, ex'c'r, &c., pl'ff in err., vs. The Mutual Assurance Society of Va. Dissenting opinion. Filed 15 Oct'r, 1881.

(Indorsement on cover:) No. 1050. Wellington Goddin, executor of S. P. Vial, deceased, plaintiff in error, vs. The Mutual Assurance Society of Virginia. Virginia sup. ct. appeals. Filed 14th October, 1881.

12-213

SUPREME COURT U.S.
FILED
NOV 2 1881
JAMES H. McKENNEY, Clerk.

UNITED STATES SUPREME COURT.

VIAL'S EXECUTORS
vs.
MUTUAL ASSURANCE SOCIETY, OF VIRGINIA. } No.——

GRÆMES' EXECUTORS
vs.
THE SAME. } No. ——

Writs of Error to Supreme Court of Appeals of Virginia.

P. PHILLIPS,
WM. A. MAURY,
WM. W. CRUMP,
for Def'dt in Error.

R. O. POLKINHORN, PRINTER.

UNITED STATES SUPREME COURT.

VIAL'S EXECUTORS
vs.
MUTUAL ASSURANCE SOCIETY, OF VIRGINIA. } No.——

GRÆMES' EXECUTORS
vs.
THE SAME. } No. ——

Writs of Error to Supreme Court of Appeals of Virginia.

The defendant in error now comes and moves the court to dismiss the writs of error in the above causes for want of jurisdiction, under section 709 revised statutes, uniting therewith a motion to affirm on the ground that, although the record may show that this court has jurisdiction, it is manifest that the question on which the jurisdiction depends is so frivolous as not to need further argument.

P. PHILLIPS,
WM. A. MAURY,
WM. W. CRUMP,
for Def'dt in Error.

To ----------

Take notice that the above motion will be submitted to the court on the —— day of ———, 1881, on the grounds and for the reasons stated in the brief accompanying this notice.

P. PHILLIPS,
WM. A. MAURY,
WM. W. CRUMP,
for Def'dt in Error.

WASHINGTON, day of ----------, 1881.

The defendant in error was incorporated by the State of Virginia in 1794.

To charge it for the destruction of certain premises by a fire that occurred in the city of Richmond, State of Virginia, on 3d April, 1865, the day on which the Federal forces entered the said city, Vial's executor filed a bill in the Chancery Court for Richmond city, and Graeme's executors instituted an action at law in the Circuit Court of the city of Richmond.

The bill was dismissed in the one case, and a judgment for defendant was rendered in the other.

By appeal and writ of error the cases were taken to the Supreme Court of Appeals, where the action of the court below in both cases was affirmed.

They are now brought here by writ of error to said Supreme Court of Appeals, under the provisions of section 709 of the revised statutes.

The Federal Question.

Has the Supreme Court of the State, in affirming these judgments of the Richmond Chancery and Circuit Courts, subjected itself to the revisory jurisdiction of this court?

If it has, it must be because—

First—it has decided *against the validity* of a treaty, statute or authority of the United States. Or—

Second—has *sustained the validity* of a statute or authority of the State, challenged as being repugnant to the Constitution, treaties or laws of the United States. Or—

Third—has decided against some title, right, privilege or immunity claimed under the constitution, treaty, statute, commission or authority exercised under the United States.

These are the limitations determined by the Constitution

and Act of Congress, and unless it can be shown that the action of the Supreme Court of the State falls clearly within one of these conditions, this court can take no other proceeding than to dismiss for want of jurisdiction.

The controversy between the parties involves the construction of the following stipulations attached to the policies under which the plaintiffs claim:

SEC. 11. Buildings insured by this society are only insured against such losses or damages as may be occasioned by accidental fire, or by lightning.

SEC. 12. No policy whatever, which may be issued, shall bind the society to answer for losses which may result from riots, civil commotions, or insurrections; from the invasion of a foreign enemy, from hurricanes or earthquakes, or from the direct or indirect agency of the proprietor of the building which may be burnt.

Looking to the opinion of the State Court for the grounds of its judgment, we find a recital of the evidence, showing the origin of the fire. It is there said—

"The action of these officers was in accordance with military orders received by them, and in accordance with the act of Congress of the Confederate States, passed 17th March, 1862.

"From the evidence quoted, and the act referred to, it is plain that this fire from which the appellants' buildings were burned, resulted from the act of these military officers, acting under express orders, and by virtue of an act of Congress of the Confederate States.

"Certainly it cannot be said that the fire which consumed the buildings of the appellants was an *accidental fire* or a fire by lightning."

Again:

"No man can say, reading the facts of this case, that the fire which consumed the heart of this city was an accidental fire, but must conclude that it was a fire which

originated and was caused by, and resulted from, the acts of a military power, which the Assurance Society had nothing to do with and over which they had no control.

"It is plain the Assurance Society never intended to insure buildings against loss or damage by fire which was occasioned by a power over which they had no control, and could not resist.

"Is it possible that, with the careful and guarded language by which this society expressed its contract, using every term possible to use, to express its unwillingness to insure against any loss by fire, except what was merely accidental, that it can now be held that a fire, originating from the agents and officers of a military power over which the society had no control, will bind the society against the express stipulation of the contract."

This construction of the 11th section disposed of the controversy. It is a final and conclusive judgment between the parties, and, however erroneous it may be, there is no power in this court to revise it.

But what if it should appear that the court has also decided a question Federal in its character, and this erroneously?

The answer is to be found in the repeated adjudications of the court. If the local question fully disposes of the case, the judgment of the State court must be affirmed.

Mr. Justice MILLER, in *Murdock* vs. *City of Memphis*, (20 Wall., 590,) a case elaborately argued and carefully considered, thus announced the decision of the court:

"When it appears that a Federal question was decided erroneously against the plaintiff in error, we must then reverse the case undoubtedly, *if there are no other issues decided in it than that.* It has often occurred, however, and will occur again, that there are other points in the case than those of Federal cognizance, on which the judgment of the court below may stand; those points being of themselves sufficient to control the case.

In such a case, why should a judgment be reversed for error in deciding the Federal question, if the same judgment must be rendered on other points in the case? And why should this court reverse a judgment which is right on the whole record presented to us; or where the same judgment will be rendered by the court below after they have corrected the error in the Federal question."

Again:

"This examinationi into the points of the record other than the Federal question, is *not for the purpose of determining whether they were correctly or erroneously decided*, but to ascertain if any such have been decided, and their sufficiency to maintain the final judgment as decided by the State Court.

"Beyond this we are not at liberty to go, and we can only go this far to prevent the injustice of reversing a judgment which must, in the end, be reaffirmed, even in this cause, if brought here again from the State Court after it has corrected its error in the matter of Federal law."

We have cited this case on the assumption that the opinion presented a *Federal question*. We now deny that any such question was decided, or even referred to.

After disposing of the case, under the 11th section, the opinion thus proceeds:

"What is the contract? Affirmatively, the society declare that it will insure against all losses caused by accidental fire or lightning. Negatively, it declares that it will not insure against losses or damage which may result from 'riots, civil commotions, or the invasion of a foreign enemy.'

"Now, the burning in this case was not accidental, but the evidence shows it was in consequence of the invasion of this city by the Federal army."

"Unquestionably the company intended to protect itself against all losses, except by accidental fire; and in the contract of insurance they used terms that would seem to embrace every conceivable condition of affairs except accidental fire. I suppose that civil commotion must necessarily arise when there is civil war. It is true there may be civil

commotion without civil war, but certainly there cannot be civil war without civil commotion, and I think no man who lived in the last decade would say there was no *civil commotion* between 1861 and 1865."

Having thus decided that the loss was occasioned by "civil commotion," the opinion continues:

"But the company not only protected itself against liability for loss occasioned by riots, insurrections, and civil commotions, but against 'the invasion of a foreign enemy.'

"In the light of history, and of fact familiar to every man who opens his eyes and sees material facts before him, is it not plain that the late war was an invasion of an enemy, and that it was the invasion of a 'foreign enemy?'"

After citing numerous decisions of this court establishing the doctrine that the war between the two sections was a civil war, accompanied by those incidents which pertain to war between independent nations, and that the inhabitants of the Confederate States on the one hand, and of the loyal States on the other, became thereby reciprocally enemies to each other, and were liable to be so treated, it is said:

"These authorities are sufficient to show that the Confederate States were certainly, as long as the war lasted, a separate and independent government, and foreign to the United States of America.

"When, therefore, the Assurance Society stipulated that they could not be held responsible for loss or damage which might result from the invasions of a foreign enemy, such stipulation protected them against loss which was directly consequent upon the invasion of the United States, which was a foreign enemy to the Confederate States."

Then the whole matter is thus summed up:

"A contract of Insurance, like all other contracts, must be construed according to the plain meaning and intention of the parties. It would be strange indeed, that this Society so carefully guarding its liability and using every concievable term to protect itself, should now be held liable for loss and damage growing out of a civil war, because it

did not use the term "civil war," but, in fact, used all other terms to show that it would not be responsible for a loss caused by a power over which it had no control."

It is thus seen that the State Court having first decided that the society was not liable because the fire was not *accidental*, but was occasioned by "*civil commotion*," also held that the exemption likewise existed under that clause of the section which excepted fire resulting from the "*invasion of a foreign enemy.*"

The pretext of a federal question, we presume, will be rested on the last ground of exemption. But it is plain that the decision, whether right or wrong, affords no basis for the jurisdiction of this court, as it denied to plaintiffs in error no "title, right, privilege or immunity" claimed under the United States, and no statute or authority of the State or the United States was passed upon.

All that the court was called upon to do was to declare what was the true construction of a contract made between two of its citizens. This is all that it has done; and the controversy is ended.

Many attempts have been made to invoke the revisory jurisdiction in transactions more or less affected by the late civil war, and all have failed where they could not be brought strictly within these well defined heads of jurisdiction.

These cases are all cited in *Bank* vs. *McVeigh*, where the cause was dismissed, as it "no where appears in the record that the plaintiff in error set up or claimed any 'title, right, privilege or immunity, under the constitution or authority of the United States, which was denied him by the decision below.'"

92 U. S., 332.

The case of *The New York Life Insurance Company* vs. *Hendren* was also dismissed, it "no where appearing that the constitution, laws, treaties or executive proclamations of the United States were necessarily involved in the decision."

The court distinguishes the case before it from that of *Matthews* vs. *McStea* (20 Wall., 640), where the effect of the *President's Proclamation* of 19th April, 1861, was directly in issue.

92 U. S., 286.

In *Williams* vs. *Bruffy* the jurisdiction was maintained on the ground that the confiscation act of the Confederacy, enforced by the decision was, in effect, a *statute of the State*, the court saying, "any enactment, from whatever source originating, to which a State gives the force of law, is a statute of the State, within the clause cited relating to the jurisdiction of the court.

96 U. S., 176.

So in *Ford* vs. *Surget*, the jurisdiction is asserted on the same principle; the court holding that "the overruling of the demurrer must be accepted in every essential sense as an adjudication in favor of an act of the Confederate Congress, recognized and enforced as law in Mississippi, and which act, according to the rule laid down (in *Williams* vs. *Bruffy*), must be therefore regarded by us as a *statute of the State*, within the meaning of the provisions of the act declaring the appellate jurisdiction of the court.

97 U. S., 594.

In *University* vs. *People*, the court say:

"The question of jurisdiction to reverse the judgments of State courts is so frequent, and the principles which govern it so well settled, that we need not be very elaborate in our opinion. The argument is that the judgment of the State court is limited to the construction of the fourth

clause of the amendatory charter of 1855, as it is affected by the Constitution under which it was enacted, and whether that statute was a contract or not, or *whether it was properly construed or not*, it is still but the decision of a court construing a statute or a contract; and there is *no law of the State impairing the obligation of that contract* within the meaning of the Constitution of the United States."

"If this be true in point of fact, the conclusion would be sound, as we have repeatedly held in this court; *Railroad Company* vs. *Rock*, 4 Wall., 177; *Railroad Company* vs. *McClure*, 10 Wall., 511: *Knox* vs. *Exchange Bank*, 12 Wall. 379.

99 U. S., 319.

We then confidently submit that neither in the *opinion* of the court, nor in the *dissenting opinion* is there to be found any decision of a Federal question, assuming that the court would look to them for the purpose of determining their jurisdiction.

No such question is raised by the *record proper*, which say the court in Murdock's case *supra*, is, after all, be the case in law or equity, "the chief foundation of the enquiry."

The motion made by defendant in error should therefore be granted.

P. PHILLIPS,
WM. A. MAURY,
WM. W. CRUMP,
for Defendant in Error.

112-293

IN THE

Supreme Court of the United States.

GRÆME'S EX'R v. MUTUAL ASSURANCE SOCIETY OF VIRGINIA, No. 95.

VIAL'S EX'OR v. SAME, No. 96.

Brief of John Howard, of Counsel for Appellants.

In the Supreme Court of the United States.

GRÆME'S EX'OR v. MUTUAL ASSURANCE SOCIETY OF VIRGINIA, No. 95.

VIAL'S EX'OR v. SAME, No. 96.

BRIEF OF JOHN HOWARD, OF COUNSEL FOR APPELLANTS.

Statement of Case.

These cases came to this court from the Supreme Court of Appeals of Virginia under the second section of the act of 1867, the first being a writ of error and the second an appeal. They were heard together in the court below and have been heard together in this court on a motion to dismiss for want of jurisdiction. That motion was overruled and a consideration of the question postponed until the hearing upon the merits, and the cases are now brought on for argument and decision in regular course upon that question and the general merits. The object of the suits was to recover from the defendant company the amount of certain policies of fire insurance effected many years prior to the late war, in the city of Richmond, Virginia, on buildings therein situated, for losses by the destruction of said buildings by the fire in Richmond of the 3d of April, 1865, upon the occasion of the capture of the city by the army of the United States and the retreat of the Confederate forces.

The Græme case (No. 95) was an action at law in the

Circuit Court of the city of Richmond, and by agreement of parties by counsel a jury was waived, under the statute (Code 1873, p. 1065, § 36), and the whole matter of law and fact submitted to be heard and determined by the court, and the matter was heard and determined by the court, its opinion delivered, exceptions to the same filed, and the agreed facts made part of the record, pp. 4–21, corresponding to a similar Federal statute and practice illustrated in *Ins. Co.* v. *Boon*, 95 U. S. 117.

The *Vial Case* was a suit in chancery, and all the evidence as part of the record can be examined by this court. *River Bridge Co.* v. *Kansas P. Ry.*, 92 U. S. 315. And the pamphlet, styled the "Constitution, Rules and Regulations" of the defendant, filed as an exhibit with its answer to the complainants' bill, in the *Vial Case*, is part of the record, though, being printed matter, was under the statute (Code of 1873, 1139, § 6) and by stipulation of counsel not inserted.

The opinion of the Court of Appeals was delivered in the *Vial Case* (Rec. 91–110), and under the Constitution of the State, and the rulings of this court, is made part of the record. Code 1873, p. 83, Art. VI, § 4; *Murdock* v. *Memphis*, 20 Wall. 633; *Gross* v. *U. S. Mortg. Co.*, 108 U. S. 477.

The general outline of the facts is the same in both cases, but in the *Vial Case* there is strong and clear additional proof as to the sufficiency of the wind to stand as a new one intervening, and the proximate and determinate cause of the losses in suit, one of the most important issues made. Pp. 72–82.

In *Keith* v. *Clark*, 97 U. S. 455, in error to the Supreme Court of the State of Tennessee, this court said by Mr. Justice Miller delivering the opinion: "As the same facts are involved in the question of jurisdiction and the issue on the merits, it may be as well to state them."

A proper statement of the facts in these cases will show the same condition of things, and such statement will necessarily be to some extent an argument, and indeed will be all the argument required for a correct understanding and adjudication of the jurisdictional facts, as well as the facts upon the merits, which are substantially the same.

The first question is, what was the real contract between the parties? Against what risks did the defendant promise indemnity or induce the assured to believe that indemity was assumed? The answer will depend upon the legal constitution of the company, its modes of doing business, and what was done in these cases. The acts of assembly constituting its charter expressly state that the charter was granted "to relieve the unfortunate who may suffer from the great and frequent losses sustained by the ravages of fire," and that the principles of the institution should be "that the citizens of this State may insure their buildings against the losses and damages occasioned accidentally by fire, and that the insured pay the losses and expenses and his share according to the sum insured."

And it is provided that the fund created shall be kept for the purposes of paying such losses, "unless it be proved that the proprietor of the buildings did wilfully occasion the fire, directly or indirectly," showing what was meant by "losses or damages, occasioned by fire accidentally." Pamphlet, pp. 1, 2, sections 1, 2 and 5. The policies upon their face all insure broadly "against loss or damage by fire;" or, as is again broadly expressed, "all such losses or damages as may happen by fire *or lightning*," two natural elements alike external to the insured, and equally beyond his control, except in case of fraud on his part in creating a fire for the purpose of loss. Græme Rec., 5, 6; Vial Rec. 13, 16.

But in the application or "declaration" for insurance, and in the policies, it is stated that the contract on the part of the company is to make indemnity, "according to the true intent and meaning of the Acts of Assembly of Virginia, and the Constitution, rules and regulations of said society."

It nowhere appears in the record that any of the insured were furnished with a copy of the said so-called "constitution, rules and regulations," or had any actual knowledge or notice leading to knowledge of the existence of any excepted perils, and the elaborate answer of the company to the bill in the chancery suit (*Vial Rec.*, 10-13) omits to state any such defence. They appear, on the contrary, to have paid the insurance money from year to year upon the faith of the broad indemnity held out by the Acts of Assembly constituting the charter and plainly assumed upon the face of the policies, and were awakened to a different condition of things only after the misfortune occurred. Upon application to the principal agent they were then informed that the loss would not be paid because it resulted from "an act of war," and upon further inquiry they were "respectfully referred to § 12, art. x. of the 'constitution, rules and regulations,'" to be found on the 16th page of a pamphlet of 27 pages, where, amid many legitimate regulations for the transaction of business, were embodied these important exceptions or limitations of the peril assumed by the company:

"No policy whatever which may be issued shall bind the Society to answer for losses which may result from riots, civil commotions or insurrections, from the invasion of a foreign enemy, from hurricanes or earthquakes, or from the direct or indirect agency of the proprietor of the building which may be burnt." *Græme Rec.* 9; *Vial Rec.* 40-41.

The plaintiffs in error contend that these sweeping limitations of the risks can, in no just sense, be considered in the light of *mere* rules for the transaction of business or the government of the company, but that they are, in legal effect, terms and conditions of insurance, and exceptions and qualifications of the indemnity assumed, of which express notice of some sort ought to have been given at the time the contract of insurance was made. They contend that there is nothing in the legal constitution of the company which exempts it in dealing with the public from the ordinary obligations of good faith and fair dealing, or from the necessity of making known any secret qualifications or exceptions to risks plainly assumed upon the face of their contracts, and that the public in accepting such contracts have the right to infer that what does not appear does not exist. The defence to this contention is, that the defendant is a mutual company, and that every member is presumed to know the rules and regulations. But it is submitted that there is nothing in the feature of mutuality, which affects a person in taking a policy, and thereby becoming a member, with knowledge of terms of exception or qualifications of liability not brought to his attention at the time, and not appearing upon the contract which the corporation proposes to make with him. The only principle of mutuality involved is that of contribution to a common fund, and when the policy-holder has no part in, or control over the government of a corporation, he is as much a stranger to it, when dealing with it in the line of its business, as if it were a stock company. Mr. Chief-Justice Gibson explained the whole element of mutuality in a sentence:

"The act of incorporation provides that a party (taking a policy) shall *ipso facto* be a member of the company; and on no other plan could a mutual insurance company

be constituted, the object of the members being to share each other's losses for the general weal, and not bear the of risk losses for a premium." *Susquehanna Ins. Co.* v. *Perrin*, 7 Watts and § 351, affirmed in *Satterwhite* v. *Mutual Ben. Ins. Association*, 14 Penn. St., 396. In *Union Ins. Co.* v. *Hoge*, 21 How., 64, the Supreme Court of the United States, by Mr. Justice Nelson, say: "The theory of a mutual insurance company is, that the premiums paid by each member for the insurance of his property constitute a common fund, devoted to the payment of any losses that may occur." See also Angell on Fire and Life Insurance, § 10. That is the sole and exclusive principle of mutuality involved. The rest is machinery for the goverment of the corporation, and its contracts made with the public stand upon the same footing as the contracts of other corporations or individuals. And it is a great mistake to suppose that its members are not "share-holders." May on Ins., § 549.

Whether a company receives its premiums all in cash, at one payment, or part cash, and the balance in premium notes, on which assessment are to be made from time to time, or take liens on the property insured, for quotas and additional premiums, it may not the less be a mutual company, and the mutuality consists in the common agreement of the insured to create and preserve a special fund by their contributions, out of which indemnity shall be paid to each for his losses *Union Ins. Co* v. *Hoge*, 21 How., p. 35; *Mygatt* v *New York Pro. Ins. Co.*, 31 N. Y. Reports, p 52; *Ohio Mutual Ins. Co* v. *Marietta Woollen Factory*, 3 Ohio St., 348

It is popular and even legal *parlance* to say that each member is both insurer and insured. Correctly understood, this is true. Each is insured, certainly. But by whom? Not by the other members any more than in a stock company, all of whose capital is as much mutually

bound to make good each and every insured loss as is the capital or resources of a mutual company. Each member is insured by the corporation, and he is an insurer only in the sense that he is bound to contribute, or has contributed in a certain proportion and in a certain manner, to the creation of a fund to meet indemnities, and to that extent a stockholder in a stock company is equally an insurer of himself if he takes out a policy. But nobody ever supposed that a stockholder in a stock company, when he takes out a policy, in a legal sense insures himself or is his own insurer. The corporation is the insurer, and he is the insured. And the same is precisely true of what are so vaguely called "mutual companies."

Necessarily, in every insurance by such a corporation, just as in every insurance by a stock company, there are two contracts, or what has been called a two-fold contract, and they are independent contracts in the one case as much as in the other. The one contract is by the insured—it is to pay premiums in the manner, at the times, and to the amounts agreed upon, if he would get the benefits of the insurance. The other is, in consideration of such premiums, to indemnify the insured against losses insured against. Each must be construed by its own terms, and each promise is the promise only of the party who makes it. Each may refer to the other or be modified by the terms of the other. But still each, when completed and delivered, is the contract alone of the party making it.

Thus in *New England Mutual Fire Ins. Co.* v *Butler*, 34 Maine, p. 451, it was held that "a policy issued by a mutual insurance company, and a premium note given at the same time for the payment of assessments, are independant contracts," and that "a contract made by a mutual insurance company is equally binding as if made with a stranger."

In *Cohen* v. *New York Mutual Life Ins. Co.*, 50 N. Y., 624. Allen, J., said: "The defendant is a body politic and corporate, capable of contracting, and of suing and of being sued, and the relation between the plaintiff and the corporation is that of insured and insurer; and the rights and duties of the contracting parties are to be governed and determined by the terms of the policy, as in other cases. Other and incidental rights are secured to the plaintiff as a member of the company, one of the corporators, but this does not make the members partners between themselves, or effect the express contract of the corporation."

In *Mutual Benefit Life Ins. Co.* v. *Hilyard*, 37 New Jersey (L.) Reports, 474, this language is expressly approved, and the Supreme Court of that State says: "The suggestion is made, that being a mutual company, the contract therefore is like a partnership. The company is a body corporate, capable of contracting as such, and the relation is between insurer, a corporation, and insured. * * The contract is the contract of a corporation, and whatever incidental advantages may appertain to a member, that does not affect the contract of the policy." And in *Oluff* v. *Mutual Benefit Life Ins. Co.*, 99 Mass., p. 317, the Supreme Judicial Court of Massachusetts held that, "In a policy of insurance, the fact that it was made by a mutual company, with one of its members upon his life gives to words used for a definite purpose and applied to transactions of a clearly defined character, such as a provision that the policy shall be void if the insured shall die in the known violation of any law, no significance different from what would be their fair construction in a similar contract between any parties." And see *Commonwealth* v. *Mass. Ins. Co.*, 112 Mass. 117, and *Cummings* v. *Sawyer*, 117 Mass. 33, where the subject is considered with the usual ability of that court; and in this last case the whole matter is thus summarized: "The

obligations of each party depend upon its own conditions."

In respect to the present company, its existing constitution is singularly unfavorable to the suggestion that its contracts of indemnity are exempted from the rules ordinarily applied to such contracts of a stock company. As originally constructed, no provision was made for the government of its business, except by the votes of a majority of the members in person. Pamphlet, p. 1, 2, 3, 4. The impracticability of such a feature was obvious, and was soon demonstrated. Meetings were rarely held and badly attended by the widely scattered and dispersed policy-holders. The Senators and Delegates to the Legislature were then authorized during the session of that body to represent absent members. Pamph. 5. That relief, of course, was vain. Then all practical management of the corporation was bestowed upon a President and Directors.

By "an act for carrying into execution the Constitution" of the company, passed January, 1805, among other things power is conferred by section 10 upon the President and Directors" to form such rules and regulations for the transacting of the business of the society, whether it be to fix the rates of hazard, the *quantum* of interest to be insured, the recovery of moneys due to the society, or any other matter that they may think conducive to the interests of the society." And section 12 is in these words—authorizing a regular distribution of dividends, a new feature engrafted upon the charter:

"Once in every five years there shall be a dividend of the surplus interest arising from the sums vested, if any surplus there be amongst the present insurers, and all who may insure in the course of the year 1805, and once in every five years thereafter amongst those, their heirs, &c., whose property may have been insured for the space of four years or more, and amongst none others." And

by section 16 it was provided that all previous acts "be repealed, as far as the same or any part thereof may be repugnant to this act." Section 19 provides for the annual election of President and Directors at a general meeting. Pamphlet, pp. 7, 8 and 9.

That device also fell through. The annual renewal of delegated authority by an immensely numerous and dispersed community was soon discovered to be equally impracticable, as had been the management by the scattered multitude in person, from the impossibility of co-operation, and by act of February 16, 1809, §§ 3, 4, the office of President and Directors was abolished, and instead the permanent organism of a Principal Agent and Standing Committee was established, "any three of whom may act, * * * and shall have power from time to time make any rules and regulations as to the government of said society, and exercise all the powers now vested in the President and Directors." And by Art. II, § 2, of the said Constitution, Rules and Regulations," following in said pamphlet the said Acts of Assembly, and forming the bulk of the pamphlet, it is provided that "The standing committee, or a majority thereof, shall have power to fill all vacancies in their body occasioned by death, resignation, or refusal to act during the recess of the general meeting * * * to fill any vacancy in the office of Principal Agent occasioned by death, resignation, or removal from office."

The government of the company by the "majority of votes" of the policy holders, contemplated by the original charter, was thus set aside as impossible, and all power of conducting the business was devolved upon a Principal Agent and a small executive and legislative body, capable of indefinitely renewing and continuing its existence, and of appointing and removing the Principal Agent.

Thus by force of necessity and a process of natural de-

velopment, an anomolous institution was evolved and changed from its original plan of practical mutuality of government as well as of contribution, into substantially a different legal organization—a corporation with an automatic independent operative agency of self perpetuating power of continuance for the transaction of business—(including the distribution of dividends)—of the whole management of which the policy-holders know less, and with which they have far less to do, than the stockholders in a professedly stock company. For no such thing as a "general meeting" of the tens of thousands of the widely dispersed policy-holders has ever since been known, and it was plainly to avoid the necessity of such an impossibility that the self-perpetuating machinery was created as an instrumentality of corporate operations.

The little autocracy of innate immortality of succession is said to be composed of the ill-fated number *Thirteen*; but whatever be its number ("any three of whom shall form a quorum * * to make rules and regulations") it is the organism of a corporation, which differs from a stock company only in the manner of collecting premiums, in the absence of nominal shares of stock, and in the absence of all control over, or knowledge of, the business by the share-holders, and which, in making its contracts of insurance with the public, stands certainly upon no higher or different ground than an ordinary stock company.

In the able dissenting opinion delivered in these cases by Anderson, J., Vial, Rec. 108, 109, it is contended with great force, that the power exercised by the Standing Committee to alter and modify the general insurance against fire authorised and established by the acts of assembly composing the charter was *ultra vires*, and that the attempted limitations or exceptions were consequently

void and formed no part of the policies issued by the corporation.

It is not necessary to sustain that contention, if, as we submit, though the power existed, it was not so exercised as to introduce the reservation of risks into the contracts made with the public. And we insist that every consideration of reason and justice requires that the insured should not, under the pretence of an internal "rule and regulation" of the corporation, be bound by concealed exceptions altogether foreign to the acts of assembly and to the face of the policies and materially changing the indemnity which invited acceptance.

Frequent frauds having been perpetrated by importation into a policy, by vague reference to other instruments, of stipulations, conditions, qualifications and exceptions, not appearing upon its face, the strong tendency of modern decisions, as is well known, has been, in furtherance of the great objects of the contract, and of equity and fair dealing, to discard from consideration everything which the policy does not express or plainly imply upon its face. And in some States, as in Massachusetts, it is prescribed by statute that "neither the application of the insured, nor the by laws of the company, shall be considered a warranty *or part of the contract, except so far as they are incorporated in full in the policy, and so appear on its face before the signature of the officers of the company.*" And a standard writer, after citing this statute, remarks that it "was but a legislative expression of the judicial tendency at that time." May on Ins., p. 170, in *note*. "Words purporting to be a condition upon which the policy was issued, must be set forth in such a place and in such manner as leaves no doubt that they were so intended," &c. Wood on Fire Ins., p. 147, § 60.

These principles of natural justice and equity, so fit to be incorporated into the general insurance jurisprudence

of the country, have been fully recognized and adopted by this company.

Entirely aware of its loose way of doing business before the war, of the retention of the policies of its customers in its own charge and custody, (see amended bill, Vial, Rec., p. 7 and p. 9,) and of the utter absence of any pretence that it had delivered to its insured copies of the complicated volume of the divers acts of assembly, and its additional intricate and involved Constitution, rules and regulations, or that anything appeared upon the face of its policies to indicate any exception to the broad generality of the risks thereby assumed, it, *after the war*, inserted and expressed, plainly and fully upon the face of its policies, the "terms and conditions," qualifying its assumption on the face of its policies of "all such losses and damages as shall happen by fire." Vial, Record, pp. 27, 28, Exception No. 6, containing an enumeration of political perils, as exceptions, now attempted, by implication, to be engrafted upon the face of the policies.

At what time this so-called "rule and regulation" was adopted by the Standing Committee, does not appear in the record. The Pamphlet aforesaid states that the said "Constitution, Rules and Regulations" were in force on the 1st October, 1856. If it was adopted at a previous date, and the fact was of importance to the company, it should have been proved. Certainly the policies in suit were in force at a much earlier date.

Neither of these records discloses how long indeed the buildings destroyed had been insured by the defendant in error. But it is easy to see that they had been insured for many years before the several dates of the last policies. Thus, in the Vial case, p. 15, policy No. 17,940, which bears date the 19th of February, 1856, was a policy on a revaluation of the building, declared for by a former declaration,

No. 15,601; and as, by Art. XII, § 1, p. 17, of the Const., R. and R., a revaluation takes place "at least once in seven years," it may be assumed that that particular building was insured as far back as 1849. How much farther back we cannot tell. So in the Græme record, on p. 5, it appears that policy No. 19,656, on which the suit was brought, was for the revaluation of buildings declared for, per former declaration, No. 16,194, and bears date (p. 9) the 31st day of December, 1858, and it may safely be assumed that the original assurance dates back as far, at least, as 1851. How much farther, we do not know.

It is deemed, however, not improper to add that in one of the two other Græme suits, brought in the Circuit Court of the city of Richmond, and which, by stipulation of counsel, are to await the decision of this suit, it appears that one of the policies runs back as far as the year 1836. And as the insurance in this company is perpetual in its nature, never lapsing for non-payment of assessments (the lien for which can always be enforced by suit or summary motion), and the company had done an extensive business for so long a time, it is fair to assume that in many cases, of which these present the test litigation, the company had received premiums and annual "quotas," and additional premiums on revaluation, from a time so far back, that the insured and their ancestors had, before the losses occurred in April, 1865, paid insurance money that, if duly invested, would have exceeded, in principal and interest, the entire value of the property destroyed. Would it be contended that during all or any part of that time the standing committee could by the mere passage of a "rule and regulation" alter the terms and conditions of the insurance, without the knowledge and consent of the insured? Yet if the said clause of excepted perils is a part of the policy because the insured agreed to "abide by, observe and

adhere to the constitution, rules and regulations of this society," no reason is perceived why that might not have been done: For the agreement does not stop at those words, but continues "which are already, or may hereafter be established for the said assurance society." The extravagance of such a pretension but illustrates the enormity of now holding the insured bound by terms and conditions of insurance amounting to most important exceptions to the risks assumed, of which he had no notice at the time of accepting his policy. And as it does not appear that when the policies in question were accepted this so-called "rule and regulation" was in force, it would seem to be still more unjust to incorporate it as a term and condition of the contract. Certain it is, that all of the contracts now in suit originated many years before the late war, and that full consideration was paid and secured for whatever risk was supposed to be assumed, and that, upon the highest moral grounds, the insured are entitled to indemnity, if legally so entitled, and as the company was a Virginia corporation, and all of its assured were citizens of Virginia and of the United States, where the contracts were made, and were to be performed, the contracts were based upon that long-established condition of things, and must be accordingly construed and enforced in conformity with the Constitution and laws of the United States, which entered into and formed part of the same.

Assuming the said exceptions to be valid limitations of the charter and of the policies by which the assured are technically bound (though without notice of the same), the question arises, what was the meaning of the exceptions? What foreign enemies were referred to? Enemies foreign to the United States, where the contracts were made and were to be performed? Or enemies, foreign to some other country—some country, per-

haps, not yet in existence, to be formed out of a part of the United States, wrested from it by force of arms? "Insurrection" against what government—the Government of the United States, or against the government of some other country?

Such were the contracts.

Long after the contracts were executed, and while being in full force, eleven Southern States, in the winter and spring of 1861, passed ordinances of secession and formed a constitution and government known as the Confederate States of America. By proclamations of the 13th, 17th and 27th of April, 1861, the President of the United States inaugurated public war against the said States as engaged in insurrection and rebellion, and by act of July 13, 1861, Congress recognized and approved what had been done. While the war was flagrant, and after the United States had treated cotton and tobacco as peculiarly hostile property (because furnishing the staple products of the South, and its chief sinews of war), and subject to capture and confiscation as military prize, by an act of the Confederate Congress, of March 17, 1862, "the military authorities of the Confederate army" were "authorized and directed to destroy cotton, tobacco, military and naval stores, or other property of any kind whatever, in the prosecution of the war, when necessary to prevent the same or any part thereof from falling into the hands of the enemy."

In *Ford* v. *Surget*, 97 V. S. 615, Mr. Justice Clifford said: Prior to the burning of the cotton, the Confederate Congress had, directed by a legislative act, as a war measure, that cotton and tobacco liable to fall into the hands of the Federal forces should be destroyed; and the history of the period shows that immense quantities of these articles were accordingly destroyed. Regulations upon the subject were adopted by the authorities of the

United States; and those regulations, as well as the decisions of the Federal courts, show that both the civil and military authorities deemed it of great importance, to prevent its accumulation in the hands of the Confederate authorities.

"Capture of cotton, says Mr. Chief Justice Chase, seems to have been justified by the peculiar character of the property and by positive legislation. It is well known that cotton constituted the main reliance of the rebels to purchase the munitions of war in the foreign market, and it is a matter of history that, rather than permit it to come into the possession of the national troops, the rebel government everywhere devoted it, however owned, to destruction. *Mrs. Alexander's Cotton*, 2 Wall. 420." And see, *Lamar* v. *Brown*, 92 U. S. 194; *Young* v. *U. S.*, 97 U. S. 58.

In pursuance of said act, in the early morning of April 3rd, 1865, and after the surrender of the city of Richmond to the Federal army, which was approaching to take possession of the place, large quantities of tobacco and munitions of war and army stores of every kind which had been collected and prepared with combustibles for the purpose, were, in order to prevent imminent capture, set fire to by the retreating Confederates, the result of which was the ignition of the warehouses containing the same.

Some time thereafter a strong southeast wind arose and transported burning sparks and timbers over wide intervening spaces to the buildings in suit, especially in the Vial case, by which they were ignited and consumed; which wind continued until one o'clock of the day, at which time it ceased, or changed its direction, and the progress of the flames, which until then had been uncontrollable, was arrested, chiefly by the efforts of the Federal troops, and the bulk of the city saved.

Upon this state of facts the defendant company in the

courts of original jurisdiction [see its answer in the Vial case, pp. 10–13] contended that the loss of the buildings in question was not occasioned accidentally by fire, but was the result either of civil commotion, ~~insurrection~~ or foreign invasion, and proceeded to state its main ground of defence in these words:

"During and pending the existence of the said policies, violence, civil commotion, war, or invasion existed, or one or more of them existed between the United States and the Confederate States, which continued nearly four years. Towards the close of that struggle the property in the bills mentioned (covered by said policies) was fired and destroyed by the Confederate States authorities as a war measure, and in pursuance of their policy declared and adopted in case of foreign invasion, under the following circumstances: The city of Richmond, the *situs* of the property aforesaid, was the capital of the Confederate States, and had been occupied by its government for nearly four years.

"Large supplies of munitions of war and army stores of every kind had been collected and stored by said government in the said city, in depositories held and occupied by the said government. It had taken possession of all the tobacco in said city, and had stored the same in certain warehouses, which were held under its control and subject to military supervision; and it had, with a view to the burning of said tobacco, placed and distributed throughout the same, in said warehouses, a large quantity of combustible materials, to facilitate and expedite the burning of the same on the 3rd day of April, 1865, in consequence of imminent and impending danger of the capture of the city of Richmond by the forces of the United States, and in pursuance of the laws and policy of the Confederate States Government to destroy military stores and tobacco which were liable to capture by the

forces of the United States, the said depositories containing said stores, and the said tobacco were set fire to and burned by the military authorities of the Confederate States; and the said fires so kindled, some of them in the very heart of the city and adjacent to the property aforesaid in the bills mentioned, spread over the city, and in their course burned, consumed, and destroyed the said property. This firing was done just as the Confederate authorities evacuated and abandoned the city of Richmond, and before the city was taken possession of by the forces of the United States. This was all done without the knowledge, consent, or concurrence of this respondent. It was done by the Confederate authorities because of a foreign invasion which led the said authorities to enact and declare that tobacco, cotton, and military stores should be destroyed when it was in danger of falling into the hands of the enemy. At the same time and from the same cause many other buildings, as described in the complainant's bill, were destroyed, and nearly all the business portion of the city laid in ruins."

It will be observed that though the defendant, in the first part of this answer, states that violence, "civil commotion, war, or invasion exisited, or one or more of them exisited between the United States and the Confederate States," it does not include "insurrection" on the part of the Confederate States toward the United States, as one of the perils by which the losses occurred, and does not rely upon that as an excepted risk; but, on the contrary, designates the Confederate States as a power enacting its own laws and at war with the United States, and as destroying military stores and the tobacco as an act of war, and in pursuance of a legal enactment, and "of their policy declared and adopted in case of *foreign invasion*." This description of that organization and of its warfare, excludes, of course, *ex vi termini*, "civil commotion," as

existing "between the United States and the Confederate States," if, indeed such an expression did not announce a solecism and absurdity, for *civil commotion* is merely an insurrectionary agitation in a State not amounting to an organized government, and the existence of such a condition of things "between" two organized governments at war with each other, is a physical and moral impossibility. The only other enumerated peril relied upon, as excepted, was the "invasion of a foreign enemy," and accordingly the foregoing defence, taken as a whole, amounts in substance to this:

That the Confederate States was a separate and independent nation, and that the tobacco and military stores were destroyed in pursuance of a law of that government, in order to prevent its capture by the United States, which was then at war with the Confederate States and had captured its capital city, and was a foreign enemy invading the same; that the fire, created in this way, of its own force and motion spread over the city and reached and destroyed the plaintiff's buildings; that as the tobacco and military stores were fired to prevent their capture by the "foreign enemy," the loss of the complainant's buildings was caused by the "invasion of the foreign enemy," and therefore the defendant company was exempt. And in accordance with that contention was the opinion and decision of the Chancellor in the Vial case, which is spread upon the record [pp. 53–59], in which it will be seen on p. 57 that his Honor said;

"I am of opinion that the forces of the United States, which took possession of the city of Richmond on the morning of April 3d, 1865, were foreign enemies, within the meaning of the exception;" and on page 58: "Now, in this case, it seems quite clear to my mind that the predominating and operative cause of the fire was the approach of the Federal troops to the city of Richmond,

the invasion of the enemy. It was the efficient, predominating peril that necessarily set all the other causes in operation." The Chancellor was of opinion that the case was covered by *Insurance Co.* v. *Boon* (95 U. S., page 117), and overruled the contention of the plaintiff, that the wind which arose after the ignition of the tobacco, and transported fire to the complainant's buildings, was, in legal sense, a new and intervening, and the true, proximate and predominating cause of the burning of those buildings.

From that decision the complainant appealed to the Supreme Court of Appeals of Virginia. And the case coming on to be there heard, together with the said Græme case, the decree of the Chancery Court was affirmed, (and upon the same grounds the judgment in the Græme case was affirmed) by a divided court, the opinion of the majority being delivered by the Honorable Joseph Christian, J., and a dissenting opinion by Anderson, J., in the results of which, Burks, J., concurred. [Vial Rec., pp. 91–99; pp. 100–110.]

As the meaning of the prevailing opinion has given rise to controversy in the briefs of counsel on the motion to dismiss for want of jurisdiction, and has been with equal confidence interpreted and construed in different ways, it is necessary to state what, in view of the whole record, may reasonably be deduced, if anything can reasonably be deduced as the result of its ratiocination.

Undoubtedly, the opinion is open to criticism as vague and shadowy in its conceptions of insurance law and as incoherent if not self-contradictory in the application of established principles to the facts. It is, indeed, not easy to discover by any analysis what, in the mind of the learned judge delivering the opinion, was in legal sense the cause of the loss, or whether the maxim *causa proxima non remota specutatur*, universally accepted in

Europe and America, received his approval, and if so, which of the two recognized modes of its application was intended to be adopted. And the opinion at one time or another apparently attributes the loss to several different, independent and irreconcilably antagonistic causes.

The thread on which these alleged causes are hung is thin indeed, namely: that the loss was not by fire accidentally—that a fire with which the assured nad nothing, directly or indirectly, to do, which, if possible, they would gladly have prevented, which, confessedly, was caused by one of two hostile armies, and was extended or transported by an April wind to the buildings burnt, was not a casualty or accident alike as to the company and the assured, according to common sense and common law. But such seems to be the contention, and the first reason given is that the tobacco was fired by the military officers of the Confederate States in pursuance of an act of the Confederate Congress. On p. 96 the opinion says: "The action of these officers was in accordance with military orders received by them, and these orders were in accordance with an act of Congress of the Confederate States of America, passed March 17th, 1862, entitled 'An act to regulate the destruction of property under military necessity, and to provide for the indemnity thereof. (see Statutes at Large Confederate States of America, 1st Congress, p. 2), which provides as follows: The Congress of the Confederate States of America do enact that the military authorities of the Confederate army are hereby authorized and directed to destroy cotton, tobacco, military and naval stores, or other property of any kind whatever which may aid the enemy in the prosecution of the war, when necessary to prevent the same, or any part thereof, from falling into the hands of the enemy.' From the evi-

dence, and the act of Congress above referred to, it is plain that this fire from which the appellants' buildings were burned resulted from the act of these military officers, acting under express orders and by virtue of an act of Congress of the Confederate States of America. Certainly it cannot be said that the fire which consumed the buildings of the appellants was an accidental fire or a fire by lightning."

It thus appears that the cause of the loss was attributed to the action of the Confederate Government, and on the same page (96) the opinion proceeds: "The torch was applied by military authorities acting under orders from the government then established as the Government of the Confederate States of America. No man can say, reading the facts of the case, that the fire which consumed the heart of the city was an accidental fire, but must conclude that it was a fire which originated and was caused by and resulted from the acts of military power, which the Assurance Society had nothing to do with, and over which they had no control." (As if, by the way, any insurance company ever has "anything to do with or any control over" the cause of a loss.)

That is reason No. 1 assigned by the court to show that the loss was not occasioned accidentally by fire, and if it is to be considered as deciding what was in legal sense the cause of the loss, this is cause No. 1.

But in the very next sentence the opinion finds another reason: "Now the burning in this case was not accidental, *but the evidence shows that it was in consequence of the invasion of the city by the Federal army.*"

That is reason No. 2, and if it is to be considered as deciding what was in legal sense the cause of the loss, this is cause No. 2.

But of course it is obvious to remark that if the loss was caused by the invasion, it could not be so caused at the same time by the Confederate Government.

Then, immediately following the foregoing words in the opinion, we have these:

"Unquestionably the company intended to protect itself against all losses except by accidental fires, and in their contract of insurance they used terms that would seem to embrace every conceivable condition of affairs except accidental fire. I suppose that 'civil commotion' must necessarily arise when there is civil war. It is true there may be civil commotion without civil war, but certainly there cannot be civil war without civil commotion, and I think that no man who lived in the last decade would say that there was no civil commotion between 1861 and 1865."

By this new position the ground seems to be shifted alike from the acts of the Confederate Government and from "the consequence of the invasion of the city by the Federal army," and thus ignoring equally No. 1 and No. 2 as a cause of the loss, appears to assign that cause to "civil commotion *between* 1861 *and* 1865." But the learned Judge does not, in terms, attribute the destruction of the plaintiff's buildings to the mere alleged fact that there was civil commotion somewhere, "between 1861 and 1865." Nor does he state what was meant by civil commotions, where it existed, at what particular time it existed, or what it had to do with the loss; and it is observable that though the opinion states generally that civil commotion existed "between 1861 and 1865," it does not, as in No. 1 and in No. 2 say, in words, that the loss was caused thereby; and to attribute the loss, in a legal sense, to so shadowy and indefinitely remote a cause, would obviously have been a mere vagary. Nor does the opinion adopt the suggestion of the defendant company in its said answer, that the loss was caused by civil commotion existing "between the United States and the Confederate States"—an absurdity too palpable for consideration. It is respectful to suppose that allu-

sion was made to that term in the exception of risks merely as an incidental make-weight, and not seriously as standing as a reason that the loss of the plaintiff's buildings was not accidental, or that it was caused, in a legal sense, by "civil commotion."

But if there be error in this assumption, and the contention of the opposite counsel as to the meaning of this singularly loose passage in the opinion be correct, we have reason No. 3, that the loss was not by fire accidentally, and if that is to be considered assigned as another cause of the loss, we have cause No. 3. And then this court will have to decide whether or not, in accordance with the contention of the defendant, the four yea s' war between the United States and the Confederate States was merely a civil commotion, and whether or not the Confederate Government, which, however illegal in its inception and continuance, was a regularly organized governme t in all of its departments, and long of paramount force in eleven States against all the power of the Union, was also merely a civil commotion, with all of the legal consequences and incidents to the actors therein of engaging in such a riotous agitation. And *Ford* v. *Sugget*, 97 U. S. 594, is supposed to have definitely settled all such questions.

We repeat, however, that it cannot reasonably be inferred that such an obvious chimera was gravely intended to be assigned, either as a reason that the loss was not by fire accidentally, or as the legal cause of the loss. And, indeed, it would be unpardonable, in the absence of an express specific statement and assumption of the solecism, to suppose that a court which, in a previous part of its opinion, had characterized the Confederate Government as "a government then established and recognized as the government of the Confederate States," and in a subse-

quent part of its opinion had decided that the Confederate States was a separate nation at war with the United States as a foreign enemy, should, in the same breath, hold either that a public war between two independent nations was merely a civil commotion, or that either belligerent was only a civil commotion.

And now comes another reason, assigned in the opinion, to show that the loss was not occasioned accidentally by fire But upon examination, instead of being reason No 4, or cause No. 4, it is proved to be, in point of fact, a more full, formal and emphatic repetition of reason, or cause No. 2, and, strangely enough, it follows immediately after the remarkable fantasy of "civil commotion" just exposed. These are the very next words: "But the company not only protected itself against liability for loss occasioned by riots, insurrection and civil commotions, but against the invasion of a foreign enemy. In the light of history, and of facts familiar to every man who opens his eyes and sees material facts before him, *is it not plain that the late war was a war of invasion, and that it was the invasion of an enemy, and that it was the invasion of a 'foreign enemy?' The United States of America was in arms against the Confederate States of America. The United States was as foreign to the Confederate States as Great Britain or France or Russia.*"

And then the learned court proceeded to prove the fact to its own satisfaction by citing its own previous decisions (*Newton* v. *Bushong*, 22 Gratt., and *Walker* v. *Branchlor*, 22 Gratt.,) and decisions of this court (*Marran* v. *Ins. Co.*, 6 Wall. 14, and *Brown* v. *Heatts*, 15 Wall. 177,) only misunderstanding the latter, and omitting others of like import, directly establishing the opposite doctrine. And then the opinion adds: "Now many authorities and opinions might be quoted to the

same effect, but I think these, already referred to, are sufficient to show that the Confederate States of America were, certainly as long as the war lasted, a separate and independent government, and foreign to the United States of America. When, therefore, the Assurance Society stipulated that they would not be responsible for loss or damage which might result from the invasion of *a foreign* enemy, such stipulation against loss, which was directly consequent upon the invasion of (*by*) the United States, which was a foreign enemy to the Confederate States. The proposition, to my mind, is too plain for argument. The stipulation is, that the company will not be responsible for loss or damage which may result from the invasion of a foreign enemy. Certainly there was an invasion of this capital city of the Southern Confederacy by the most powerful armies that were ever marshalled in modern times. It was the invasion of an enemy. * * It is equally clear that it was the invasion of a foreign enemy, as foreign to the Confederate States as England or France or Russia. * * * Now the facts already cited, show conclusively that this fire resulted from the invasion of this city. * * * * The destruction of the property, ordered to be burned by the military authorities, was a means of repelling the invasion, and was directly consequent upon the invasion. In other words, the fire was directly caused by, and was in consequence of the invasion. If there had been no invasion there would have been no fire. The fire resulted, therefore, directly from the invasion.

"I am *therefore* of opinion that the stipulation in the policy protects the company, and that it is not responsible for any loss or damage occurring from such a fire."

The foregoing is a plain and accurate statement of the three different reasons assigned why the loss was not accidental, and if these reasons are to be accepted as

assigned causes, we have here the paradox and anomaly of three synchronous antagonistic causes for the same effect.

It would be uncandid not to admit that there is thus presented an unique and grotesque appearance of conflicting contentions throughout the opinion of the learned court. For it is, of course, impossible that the same loss should have been caused at the same time, first by one government, and then by the other, and then by both, and then by the first again, as a political nondescript. What explanation can be given of this strange assemblage of apparent absurdities?

There are two hypotheses as to legal causation upon which the opinion may be considered, and these grow out of the different ways in which the maxim, *causa próxima spectatur*, is understood and applied.

Is the direct force, or agency, immediately operating upon the object at the time and place to be considered the proximate cause of the loss? And in ascertaining what that is, shall we consider the effect of a new and intervening force or agency subsequent to the original act or circumstance? And if not, shall we look back and beyond to some antecedent and primary cause, setting in motion a succession of naturally connected or dependent events, as *causa causans*, or *causa causata*, *primum mobi'e* of the whole series, without reference to nearness of time or space, the predominating and operative cause of the resulting catastrophe, aided or facilitated, it may be, by incidental o concurrent instrumentalities, not amounting to a new and independent causal force?

These distinctions, first pointed out by the Supreme Court of the United States, have been illustrated by a number of its decisions. *Ins. Co.* v. *Tweed*, 7 Wall. 44; *Railroad Co.* v. *Reems*, 10 Wall. 191; *Ins. Co.* v. *Trans-*

portation Co., 12 Wall. 199; *Morgan* v *U. S.* 534; *Reybold* v. *U. S.* 202; *Milwaukee, &c., Railway Co.* v. *Kellogg*, 44 U. S.; *Ins. Co.* v. *Boon*, 95 U. S. 117; *Scheffer* v. *Railroad Co.*, 105 U. S 249; *Hayes* v. *Mich. Railroad Co.*, 111 U. S. 228.

The opinion of the Court of Appeals is intelligible and consistent, only upon the hypothesis that it adopted the contention of the defendant company, and the opinion and decree of the Chancery Court of Richmond sustaining it; namely, that the original, continuing, predominant and efficient cause of the loss was the invasion of the city of Richmond by the Federal army, as a foreign enemy to the Confederate States, the force of which was not affected by any intervening instrumentality; and accordingly the court affirmed the decree of the Chancery Court based upon that whole view of the facts.

This hypothesis avoids the suggestion of confusion and absurdity, places the otherwise irreconcilably conflicting causes, assigned by the court, in the light of connected causes, uniting in the production of the event, the original and predominating cause of which, setting the others in motion, was the invasion of the foreign enemy, whose capture of the city, already effectually accomplished by its surrender, and whose overwhelming army, entering into possession, made the destruction of the immense stores of tobacco and army stores a military necessity by the Confederate army in the moment of its enforced flight, in order to prevent such important and valuable a prize from falling into the hands of the enemy.*

And beyond doubt, in extrication of the learned court from an otherwise incongruous and ludicrous antagonism of solecisms, it is permissible to remark that, through-

* According to the agreed facts in the Vial case, p. 84, "the quantity of tobacco in warehouses Nos. 1, 2 and 3, when the fire occurred, was from 6,000 to 7,000 hogsheads;" and see answer of the company, pp. 10, 11.

out its whole opinion, it describes and considers the Confederate States as a separate nation, enacting valid laws, and among them an act requiring the destruction of "cotton and tobacco and military and naval stores," when deemed necessary to prevent capture of the same by the United States, that the leading and predominant idea and hypothesis, and the substratum of the entire contention was, that the Confederate States was at war with the United States as a foreign enemy; that upon the capture of Richmond by surrender, and the approaching possession of the invader, the tobacco and munitions of war were fired by the retreating Confederates as a military and imperative necessity.

It is submitted, therefore, in view of the whole record and of the only consistent theory of the opinion as a whole, that it is not unreasonable to assume that the court, (assuming the exceptions to be part of the policy,) decided in substance and effect:

1. That during the late war the Confederate States was a separate and independent nation, to which the United States was a foreign enemy.

2. That the capture of Richmond by the United States army was the invasion of a foreign enemy.

3. That the loss of the insured buildings by fire was caused by the said invasion of a foreign enemy, and, therefore, was included in an excepted peril.

4. That because the tobacco and military stores were fired under the circumstances stated, and the foreign invasion of the city was the legal cause of the loss, that loss was not by fire occasioned accidentally, and therefore was excluded from indemnity, and that the new and independent agency of the wind, as an intervening and the really proximate and efficient cause, or as a fact imparting an element of casualty to the misfortune, is to be entirely ignored and disregarded.

ERRORS ASSIGNED.

Upon the foregoing statement of the case, it is insisted that there was error in each of the said rulings of the Court of Appeals and in all of them as a whole, and that this court has jurisdiction to correct the same.

I.

Has the court jurisdiction?

There are two general classes of cases in which this court has jurisdiction under the second section of the Act of 1867 to re-examine and reverse or affirm the final judgment or decree of the highest court of a State in which a decision of the suit could be had:

1. "Where is drawn in question the validity of a treaty or statute of, or authority exercised under, the United States, and the decision is *against their validity*," or "where any title, right, privilege or immunity is claimed under the Constitution, or any treaty, statute of, or commission held, or authority exercised, under the United States, and the decision *is against the* title, right, privilege or immunity, specially set up or claimed by either party under such Constitution, treaty, statute, commission, or authority."

2. "Where is drawn in question the validity of a statute of, or authority exercised under any State on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in *favor of their validity*." R. S., § 709.

It is submitted that this court has jurisdiction under one or both of these classes of cases.

The contracts in question, as above shown, were executed in the State of Virginia several years before the late civil war, by and between a corporation of the State

and citizens of the State and of the United States, insuring buildings in the State against losses by fire, and [if the exceptions of special risks be part thereof] assumed to assure the buildings of the plaintiffs in error against all such losses as should happen by fire or lightning, unless caused by the "invasion of a foreign enemy, insurrection or civil commotion." The fundamental rule is that "all laws which exist at the time and place of making a contract, and where it is to be performed, enter into and form a part of it." *Homestead Cases*, 22 Gratt. 288. "This embraces those laws alike which affect its validity, construction, discharge and enforcement." *Walker* v. *Whitehead*, 16 Wall. 314–317; *Antoni* v. *Greenhow*, 107 U. S. 774. The Constitution, treaties and laws of the United States in force at the time and place of making the contracts necessarily entered into and formed part of the agreement in these cases, and their obligation, validity, construction, discharge and enforcement depended upon the basis of the existing constitution and government of the United States and the relations of the United States to foreign nations and among themselves. The foreign enemies referred to were therefore plainly enemies foreign to the United States, and the exception of losses by foreign enemies had not and could not lawfully have any reference to the United States themselves as foreign enemies to its own citizens or to the State of Virginia or any other States composing the United States. So the "insurrection" referred to was insurrection against the United States, or Virginia as one of those States. The "rights, privileges and immunities" of the parties under these contracts were thus such as belonged to them as citizens of the United States, and depended upon the validity, stability and enforcement of the Constitution and laws of the United States.

The contracts were not changed by the attempted

secession of Virginia and the other Southern States, nor by any ageeement of the parties, of which there is any evidence or pretence in the record, nor did the parties thereto at any time cease to be citizens of the United States (*Keith* v. *Clarke*, 97 U. S. 454); and the contracts being valid when made, will now be construed, interpreted and enforced, and the rights, privileges and immunities acquired thereunder be respected and secured upon the original basis of the Constitution, laws and the government of the United States, out of the long established existence of which they arose, and to that effect are the decisions of this court. *Osborne* v. *Nicholson*, 13 Wall. 654; *Boyce* v. *Tabb*, 18 Wall. 546; *Gunn* v. *Barry*, 15 Wall. 610; *Mauran* v. *Ins. Co.*, 6 Wall. 1, are examples. It were vain indeed to attempt an enumeration of the cases in this court in which rights and immunities acquired under contracts entered into before the war have been construed and enforced upon the basis of the laws in existence at the time and place when made, and have been held inviolate. And in ascertaining whether rights growing out of the obligation of a contract have been impaired by hostile legislation and judicial action approving the same, the court will decide for itself what the contract was, and in making up its judgment upon that question it is not concluded by the opinion of the State court. *Delmar* v. *Ins. Co.*, 14 Wall. 661.

The whole opinion of the Court of Appeals is based upon the assumed validity of the said ordinances of secession, including that of Virginia, and upon the validity of the Constitution and government of the Confederate States, and it of course assumed the invalidity in those States of the said proclamations of the President of April, 1861, and the acts of Congress by which the late

war was inaugurated, recognized and prosecuted as a war to put down insurrection and rebellion.

The right and privilege of the assured to have their contract construed and enforced according to its original and true obligation under the Union, which composed essential elements of the agreement, were plainly involved in said action of the court below, as was also all immunity from loss or detriment of any kind by reason of the disregard of such right and privilege. The whole body indeed of the Constitution and laws of the United States, covering its citizens as with a pano poly, and entering into the rights and obligations of their contracts, and forming parts thereof, was summarily violated and set aside by the court when it converted a citizen into a foreigner to his own country, and his own country into a foreign enemy to him; and his entire contract was thus changed from its original terms and meaning, and the exception of risks, instead of referring to losses by enemies foreign to the United States, was made to exclude such enemies, and to include the United States as enemies foreign to its own citizens, and the rights and obligations of the contract were decided and defeated accordingly. A decision, thus setting at defiance the whole frame-work and system of the government and the rights and immunities of the citizens in respect to the obligation and enforcement of their contracts based thereon, draws in question, in the most effectual manner alike the validity of the Constitution and laws of the United States and of the rights and immunities guaranteed thereby, and necessarily brings into activity the appellate jurisdiction of this court.

If the invasion of Richmond by the army of the United States was, according to the contention of the defendant company and the decision of the Chancery Court of Rich-

mond, and of the Court of Appeals, in affirmance, the legal cause of the loss of the buildings in suit, and if that army was not a foreign invader, the company was not exempted by the exception of losses by foreign invasion, and was thus bound. By holding that the invasion was that of a foreign enemy, the court necessarily decided that none of the provisions of the Constitution and laws of the United States, and no right, privilege or immunity derived from or under their authority had any validity, and by holding that such invasion was the cause of the loss, deprived the plaintiffs in error of the indemnity to which they were entitled. The executive proclamations of April 13th, 19th, and 27th, 1861, declaring that insurrection existed in the Southern States, including Virginia, the Act of Congress of July, 1861, ratifying what had been done and recognizing the existing war as that of a rightful sovereign crushing out a rebellion, and all of the subsequent acts of Congress and the official acts of all the other departments of the Government in the same direction, (so frequently held by this court to be constitutional and valid, from the Prize Cases down,) were in vain and futile, if, years after the return of the peace and the restoration of the original supremacy of the United States over land and sea, a court of one of the States can declare all that action illegal and void as to the States that seceded, set up the ordinances of the secession as valid and paramount to the Constitution of the Union (for the opinion of the Court of Appeals meant that or nothing), and set aside that Constitution and the obligation, rights, and immunities of contracts arising thereunder, and make new contracts for parties, based upon the validity of the new nationality and an international warfare with the old. In *McStea* v. *Matthews*, 20 Wall., 646 and 91, U. S. 7, a decision of the Court of Common Pleas of New York,

passing upon the effect produced on a contract by the proclamations of the President in April, 1861, in inaugurating the war, was held to be reviewable by this court, and was reviewed under the said second section of the Act of 1867. Here is a decision of a State court, passing upon the effect produced on a contract by all the said acts of the President and all the acts of Congress in inaugurating and prosecuting the war, holding those acts to be illegal and void, and determining the effect and obligation of the contract upon the assumed invalidity of the whole action of the Government and the validity of the acts of a hostile Government, in opposition thereto and in subversion of the Constitution, as construed by numerous, if not innumerable, decisions of this court. *A fortiori*, jurisdiction attaches in this case.

But as part of the contention of the defendant company upon which the opinion of the Court of Appeals was founded, the act of the Confederate Congress of March 17th, 1862, must not be overlooked. By that act the military authorities of the Confederacy were directed to destroy cotton, tobacco, and military and naval stores, to prevent the same from capture by the United States. The military stores and tobacco in the Richmond warehouse were fired in pursuance of that law. The Court of Appeals (if its opinion has been properly construed above) does not hold that such act was, in legal contemplation, the cause of the loss in suit.

If it had so held, the insurance company would necessarily, according to the theory of the court as to the independent nationality of the Confederate States, have been adjudged bound for the loss, as a loss resulting from an act of the lawful home government of insurer and insured, not excepted from the risk assumed. But, on the contrary, the court held that the setting fire to the tobacco and the military stores was caused by the invasion of the

Confederate States by the United States as a foreign enemy; that the act of the Confederate Congress was thus the rightful act of a valid legal government, and not that merely of an "organized insurrection," and it was upon that assumption that the exception of "insurrection" as a cause of the loss was ignored. The validity of the act of the Confederate Congress was assumed by the court as an established and fundamental fact, just as the validity of the State's ordinance of secession was so assumed; the act of firing the tobacco and military stores in pursuance of that law was considered a rightful act lawfully done by that authority, and the exemption of the company was placed in part upon that basis.

In *William*s v. *Bruffy* 96, U. S. 176, it was held that the Confederate States was an illegal organization, within the provision of the Constitution of the United States, prohibiting any treaty, alliance, or confederation of one State with another; that whatever efficacy its enactments possessed, within any State entering into that organization, was attributable to the sanction given to them by that State, and that an enactment of the Confederate States, enforced as laws in one of the States composing the confederation, is a statute of such State within the meaning of the act regulating the appellate jurisdiction of this court over the judgments and decrees of the State courts. And in *Ford* v. *Sugget*, 97, U. S. 594, the abovementioned enactment of the Confederate Congress of March, 1862, directing the destruction of property to prevent its capture by the United States was held to be a statute of one of the Confederate States, in which it was enforced as law, and thus within the said rule of appellate jurisdiction. Thus it was also such a statute of the State of Virginia.

The repugnancy of that statute to the Constitution and laws of the United States (as that also of the State's

ordnance of secession) was clearly brought in question by the pleadings and proofs and the opinion and decision of the Court of Appeals. The defendant, as we have seen, set up the statute in its answer to the complainant's bill, and assumed its validity as *postulatum*, and relied upon the ground that the burning of the military stores and the tobacco "was done by the Confederate authorities *because of a foreign invasion, which led said authorities to enact and declare that tobacco and military stores should be destroyed when in danger of falling into the hands of the enemy.*" And the Court of Appeals, as has been shown, placed its exemption of the company from liability for the losses in suit upon the high and bold ground that none of the legislative acts of the Confederate States were repugnant to the Constitution and laws of the United States, and of course that this particular enactment was not so repugnant, that, on the contrary, the Confederate States was a separate and independent nation, and had the right to enact its own laws. It is submitted that the jurisdiction of this court to review that decision, besides other grounds above stated, stands upon the same ground as did the jurisdiction in *Williams* v. *Bruffey* and *Ford* v. *Sugget*.

II.

Assuming upon the whole that jurisdiction exists, what should be the extent of its exercise, and what should be the decision of this court?

We respectfully submit that under the special facts of this case, the question of jurisdiction necessarily in itself involves and naturally embraces a consideration of the question of what was the real and true cause of the loss.

The jurisdictional facts envelope the causal fact and

are inseparable therefrom, as in *Keith* v. *Clark*, 97 U. S., 455.

These embrace the whole circumstances and exigency of things out of which the causal fact arose What was the agency of the United States army in producing the loss? What was the agency of the Confederate act of Congress and of the Confederate army in producing the loss? What was the legal effect of an intervening agency, a natural element, the sudden rising of a powerful wind of its own force transporting fire to and depositing it upon the plaintiff's buildings, by which they were consumed? What was the effect of the action of the United States, of the Confederate States and of the wind combined in producing a loss within the policy—a loss accidentally by fire? What connection has the clause of excepted perils with the obligation of the contract to be construed and enforced?

All of these questions seem to be so involved in and complicated with the jurisdictional facts, and the jurisdictional facts so inseparable therefrom, that it is difficult to see how justice can be done without taking into consideration the whole. And thus the determination of the jurisdictional facts in this peculiar and novel case brings along with it and incidentally embraces as inherent elements the conditions of the loss and the *contestatis litis*. And in case of reversal no reason is perceived why the court should not state what, in its opinion, was the legal cause of the loss, whatever may be the general rule in other cases, if general rule there be; for in this case it seems to be impracticable, in passing upon the force of the different agencies at the same time giving jurisdiction, and entering into the causal conditions or elements of the cause of the loss, not to distinguish and point out what in legal sense was the operative and efficient cause.

It will be contended by the other side that this court

has no jurisdiction, because, as is alleged, although a Federal question or Federal questions arose in the case and were decided by the court below, yet that the decision of the court was also based upon a separate ground which was a question of merely local law—namely, that under the circumstances the loss was not a loss accidentally by fire within the meaning of the policy. But when the court below placed the gr at *gravamen* of its opinion upon the ground that the invasion of Virginia by the United States was that of a foreign enemy, and that that invasion was the legal cause of the loss, and that the company was thereby ex mpted, because the loss was thus shown not to be accidental within the meaning of the contract, it necessarily involves the question whether the obligation of the contract was properly construed by the court below, and in determining that question it is the constant practice of this court not to be governed by the opinion of the State court below, but to form its own opinion upon the terms of the contract and all of the facts of the case. *Delmar* v. *Insurance Company*, 14 Wall. 661, and *University* v. *People*, 99 U. S. 309, are examples. If, indeed, the rule were otherwise, it wo ld be an easy thing for the State courts to evade the appellate jurisdiction of this court upon Federal questions arising out of the constitutional inviolability of the obligation of contracts. In every such case, the first and great question is, what is the obligation of the contract—what is its scope and meaning, and in every case from Dartmouth College case down, counsel and court have been engaged in first determining that question. Here the obligation of the contract must be determined by the risks assumed, and to say, as the court below said, that a fire caused by the United States army as a foreign invader of its own territory was exempted from indemnity, because the fire was designed

and not accidental, in the sense of the policy, was to pass upon the very issue which, in all such cases, gives jurisdiction to this court by passing upon what was the obligation of the contract and the question of its violation, and by holding that the obligation was not broken under the special facts of the case. In the nature of things this court cannot know whether it has jurisdiction to review the action of the court below, until it first decides for itself, what was the true meaning and obligation of the contract between the parties, which was construed by that court.

It is true that when the record discloses two defences to an action brought in a State court, one presenting a Federal question and one presenting no Federal question, either of which, if sustained, is a complete defence to the suit, and that the State court gave judgment in favor of the defendant on both, and the cause is brought here by writ of error, this court will affirm the judgment below without considering the Federal question. Of this rule, *Jenkins' Assignee* v. *Lowenthal and another*, 110 U. S., 222, is an example, in which case there was one defence—that of a purchaser for value without notice—which was a question of general law depending upon the facts of the case, and the other was that of limitations under the Bankrupt Act, which raised a Federal question. In that case, as in all others of its class, the two defences were separate, distinct and different, and each was broad enough to sustain the decree. But in the present case the alleged two defences, if there be two, arose out of, and are part and parcel of the same thing, component parts of the whole. To determine, for instance, whether a loss by the invasion by the United States as a foreign enemy was a loss accidentally by fire, was to determine what are the legal elements of an accident within the meaning of the policy, and when the case comes here upon the Federal question it is

necessary to bring with it the whole contract, and the question whether, under the facts of the case, the obligation of the contract was properly construed, and the defendant company exempted from indemnity. The fact that other issues than the Federal question, or Federal questions, were incidentally involved as questions of fact, such as the force and continuance of the wind, cannot take away the jurisdiction which had already attached, or deprive the court of jurisdiction which it otherwise had.

In the leading case of *Murdock* v. *Memphis*, 20 Wall. 634, the court say that in case of a reversal by this court on the ground that a Federal question had been erroneously decided against the plaintiff in error: "It may be that there are other issues in the case, but not of such controlling influence on the whole case that they are alone sufficient to support the judgment. It may also be found that notwithstanding there are many other questions in the record of the case, the issue raised by the Federal question is such that its decision must dispose of the whole case. In the two latter instances there can be no doubt that the judgment of the State court must be reversed, and under the new act this court can either render the final judgment or decree here, or remand the case to the State court for that purpose."

We submit that under these rules it is quite competent for this court either to render final judgment or decree here, or remand the case to the State court for that purpose.

In construing the contract involved in these cases this court will ascertain for itself what was the character and extent of its obligations—what was the real indemnity it promised—what was meant by a loss by fire accidentally, and whether the alleged exceptions formed part of the contract.

For under the 34th section of the Judiciary Act of

1789, it has long been an established rule of decision in this court that questions of general commercial law, concerning the construction and legal effect of a contract of insurance, are not local in their character, and that this court is not bound by the decisions of the State Courts thereon. *Carpenter* v. *Ins. Co.*, 16 Pet. 495; *Swift* v. *Tyson*, *Id.* 1; *Watson* v. *Tarpley*, 18 How. 520–521; *Boyce* v. *Tabb*, 18 Wall. 546; *Oates* v. *National Bank*, 100 U. S. 239; *Railroad* v. *National Bank*, 102 U. S. 29. Commercial law is indeed part of the private law of nations, and insurance is the companion of commerce in its circuit of the world. It would be truly unfortunate if so cosmopolitan a department of jurisprudence should be subject to the varying and conflicting opinions of forty different appellant State Courts, and if there were not constitutionally organized one supreme Federal tribunal over all, and the inferior Federal Courts as well, of supervisory jurisdiction competent to establish and apply with uniformity and precision the great principles affecting interests of such diversity and magnitude, local, interstate and international. What legally constitutes an "accident," in the sense of insurance law, is an important part of the contract of insurance. In addition to innumerable terrine and marine risks upon property involving that question, the whole growing system of insurance against accidents to life and limb depends upon the proper judicial answer to be given thereto. But whether tested by the common understanding of men or by the decisions of the courts, the answer is as easy as its consequences are far-reaching and important. It is almost superfluous to say that in ordinary use "accident" is usually understood to mean an occurrence happening fortuitously without the intentional act or agency of the person affected thereby. And so it is defined by lexicographers. Thus Doctor Johnson defines

the word to mean, "That which happens unforeseen, casually, chance." And Richardson, "That which falls, or happens, or occurs to, generally with sub-conditions, of something unforeseen, unexpected unfortunate, unnecessary, unexpected, without design or intention." And of the American scientists of words it is sufficient to give one of the best, *Worcester:* "ACCIDENT, an event proceeding from an unknown cause, or happening without design of chance. the agent, an unforeseen event, incident, casualty, 'Some unlooked-for accident.'—Shakspeare." Other examples from that early master of English and from other high sources readily occur to every one. Thus in Othello: "Moving accidents by flood and field." Chesterfield speaks of a "chapter of accidents," an expression now proverbial. Lord Thurlow, in reply to the Duke of Grafton: "The accident of an accident"—a felicity of alliteration and paradox of application not confined by popular use to an English statesman. Our own Longfellow: "Nothing with God can be accidental."

The law has but adopted and crystallized in its definitions and decisions the universally accepted popular use of the word. Thus says *Bouvier* (Law Dic.): "ACCIDENT—The happening of an event without the concurrence of the will of the person by whose agency it was caused; or the happening of an event without any human agancy. The burning of a house in consequence of a fire being made for the ordinary purpose of cooking or warming the house, which is an accident of the first kind; the burning of the same house by *lightning* would have been an accident of the second kind." The decisions are to the same effect.

In *Crutchfield* v. *Richmond & Danville R. R. Co.* 76 N. C., p. 322, the Supreme Court of North Carolina say: "An accident is 'an event from an unknown cause;' or 'an unusual and unexpected event from a known cause,'

'chance,' 'casualty," and Richardson, "That which falls, or happens, or occurs to; generally with a sub-condition of somethi g unforeseen, unexpected, unfortunate, unnecessary, without design or intention." In *Sinclair* v. *Passenger's Ins. Co.*, 107, E. C. L., an important case upon the subject, the two last of these definitions were given by the counsel for the plaintiff, and were not controverted by the adverse counsel. Lord Chief Justice Cockburn, delivering the opinion, while admitting the difficulty of giving a definition to the term "accident," which would be of "universal application," said that "it might safely be assumed that some *violence, casualty* or *vis major* is necessarily involved." In the subsequent case of *Trew* v. *Railway Passenger Ass. Co.*, 6 Hurl. & Nor. 839, the rule was applied to death by drowning, which was held to be an accident within the policy. See also in *Filton* v. *Accidental Death Ins. Co.*, 112 Eng. C. L. R. 122, a striking application of the rule.

In *Schneider* v. *Prov. L. Ins. Co.*, 24 Wis. R. 28, the definition given and applied in these cases was fully approved and adopted. In *Clarke* v. *Barnwell*, 12 How. 272, the Supreme Court of the United States held that, 'Damage done to cotton thread, by dampness of the hold of the vessel, not occasioned by bad stowage, or any negligence of the master, or mariners, is an 'accident of navigation,' within the exception in a bill of lading." This case is additionally interesting from illustrating (p. 280) that the burden lies upon the defendant to show that the loss is occasioned by one of the perils exempted by the policy, and if he does not prove a clear affirmative, he must fail in his defense. In *Swindler* v. *Hilliard & Brooks*, 2 Rich. (S. C., p. 286), it was held that "damages of fire" and "unavoidable accidents of fire," meant the same thing.

This corporation has fully recognized and adopted this

view of its obligations, and indeed all of its large and extensive business for the ninety years of its existence has been conducted upon that basis, which, in fact, was the only basis upon which its operations and existence were founded or could be conducted.

The very preamble of the first act recites that, "whereas from the great and frequent losses sustained by the ravages of fire, it is advised expedient to adopt some mode to alleviate the calamities of the unfortunate, who may suffer by that destructive element," and that a plan had been proposed, which it was "conceived would fully answer the above purposes," which plan was adopted. Clearly the great and leading object and purpose of this plan was to afford indemnity against the common ravages by fire, not occurring by the intentional act of the insured; and this is made more demonstrably manifest by § 5 of the Act, which provides, that the premiums paid shall be kept as a fund for the purpose of making immediate reparation for losses by fire, "*unless it be proved that the proprietor of the insured did wilfully occasion the fire directly or indirectly.*" And the § 12 of Art. X, p. 16 of C. R. & R., which immediately succeeds the § 11 under consideration, forbids the issuing of policies binding for losses resulting from the *direct or indirect agency of the proprietor of the building which may be burnt.* It is too clear, therefore, for dispute that in the said exception or restriction in the said § 11 to such "losses or damages as may be occasioned by accidental fire or lightning," and in every other place in the charter or "rules," in which "accidental" occurs, the word signifies merely some casualty by fire occurring without the wilful agency, direct or indirect, of the insured. And such has been the uniform interpretation placed upon all of its policies by this company from its foundation to the present time. It is a fact of public

notoriety, which, in large part, has given this Company its great business throughout the State, that it has promptly paid all losses resulting from the acts of incendiaries, which, though intentional and designed by the malefactor, are purely and simply accidental in a legal sense, so far as the insured is concerned.

But undoubtedly, as to the losses now in suit, whatever interpretation may be placed upon the "accident" or "accidental," the fire or fires from which they resulted were strictly and purely *accidental*. Certainly in their occurrence the insured had no part or agency, directly or indirectly. And with equal certainty the *buildings insured* were not fired by design on the part of anybody. The military stores and the tobacco in question were fired by design; but all possible precautions had previously been taken to prevent the extension of the flames to other buildings than those in which the military stores and tobacco were placed. See "Agreed Facts," Græme Rec; Major Carrington's "Statement," *Id.*; Colonel Ewell's "Statement," *Id.*, where it is said, indeed, that warehouses were selected "from which the flames would not, it was thought, spread, should it become necessary to apply the torch for the purpose of destroying the tobacco they contained; and every step was taken by General Ewell to prevent disastrous results in the event of executing the order" for setting fire to the tobacco." And the Colonel proceeds: "The fire spread rapidly; partly by neglect of the fire-brigade and partly by the incendiaries. Soon the wind from the southeast became brisker, and the entire city—the flames began at the southeast—was in imminent danger of falling a prey to the advancing conflagration."

See also the Vial Record, page 39, (where, however, Colonel Ewell's statement is strangely *mutilated* and incorrectly given.) pages 72–81; also, the

depositions of Judge John A. Meredith, Dr. Davidson, and of the Misses Wood, to be found in the Vial Record, from all which it abundantly appears that not only were all possible precautions taken to prevent the spread of the fire from the warehouses, and not only were all possible exertions made by citizens and by the Federal troops to extinguish the flames, but that the morning was unusually calm and still; and that sometime after the warehouses had been fired there arose a brisk southeast April wind, which, (without here defining the extent or character of its force, as a new and intervening cause, independent and sufficient of itself to produce and stand for the loss,) may safely be assumed as a natural agency external to the insured, powerfully and directly acting in the production of the losses in suit, and eliminating all element or possibility of intention or design in the happening of these losses:

——— *Irruant Danai, et tectum omne tenebant.*
Illicet ignis edax summa ad fastigia vento
Volvitur; exsuperant flammae, furit aestus ad auras.

Surely here was *casus fortuitus* in the highest degree, and a clear and full illustration of the term "accident," given by Lord C. J. Cockburn and the Queen's Bench in *Sinclhir's Case* (*supra*) as "some violence, casualty, or *vis major*;" for there can be no question that all these three were involved in the act of setting fire to the military stores and tobacco, its unexpected progress, notwithstanding the great efforts made to arrest and extinguish the flames by friends and foes, and the concurrent adversary action of the capricious vernal wind in rising at that particular time and rolling an ocean flood of fire directly to the plaintiff's buildings.

The next question presented is, whether the alleged "rule and regulation" of this corporation sought to be

imported by implication into the "terms and conditions" of insurance and constituting important limitations of the general risks authorized and held out by the Acts of Assembly composing the charter, and plainly assumed upon the face of the policies, can or ought to be regarded as part of the obligation of the contract under the circumstances stated in a previous portion of this argument; and that question having been then fully considered, is submitted without further remark. It is only obvious and important to add that if, as we earnestly insist, the insured ought not to be held bound by so sweeping a mental reservation by this corporation in making its contracts with the public, there is an end to these cases.

For, then the policies would stand upon the general assurance against "all such losses and damages as shall happen by fire," and the losses in question were undoubtedly losses happening by fire, indemnity against "the great and frequent ravages of which destructive element" this company was specially created to furnish and secure.

Should the court hold otherwise, and only upon that hypothesis, the question will arise: what in legal sense was the cause of the loss? And that question also has already been incidentally stated, and need not be enlarged upon here. The simplest statement of the facts is the only argument required. It is admitted by the defendant company—indeed, it was its great contention, and which has brought these cases here—that the invasion of Richmond by the Federal army caused the burning of the tobacco and military stores by the retreating enemy to prevent their immediate capture by the United States, and was thus the cause of the fire which destroyed the plaintiff's buildings. And the opinion and decision of this court in *Ins. Co.* v. *Boon*, 95 U. S., was the founda-

tion of its contention and of the opinion and decision of the State courts, original and appellate.

In that case, in which, during the progress of battle and the imminency of defeat, the military stores at Glascow, Missouri, were fired by the Federal Commander to prevent capture by the Confederate forces, it was held that the invasion of the city by the Confederate forces was the *causa causaus*, the predominent, continuous and efficient cause of the loss, setting in motion the succession of naturally connected events, ending in the loss of the insured buildings. If possible, the illustration of the rule in our case seems to be stronger than in that, inasmuch as a capture by enforced surrender is the completest and most summary of all captures; and the capture of Richmond was as overwhelming, and the power of seizing military stores and tobacco by the Federal army as certain and complete as was a few days afterwards the capture of Lee's forces by surrender at Appomattox and the power of Grant's army to seize the arms and military property, which it promptly exercised.

In this class of cases, many of which are cited in the opinion of the court in Insurance Company against Boon, the principle is, that an accrued and accomplished peril, acting directly upon an insured subject, within the peril, is to be held the cause of the loss, because the loss is actually effected to prevent the operation of the peril. Thus, in *Gordon* v. *Remington*, 1 Camp. 123, always referred to in this connection, there was an insurance against *fire*, and when the *vis major* of the enemy was complete and the vessel was destroyed by fire to prevent the enemy from realizing the fruits of his capture, the loss was held to be a loss by fire, although effected by the hands of the captain and crew, it being

held to be immaterial how or in what manner the fire occurred, the capture obviously being considered already as certain and consummated, and the loss having been occasioned to prevent the prize of war from falling into tne hands of the enemy.

So in *Buller* v. *Wildman*, 3 B. & A., 398, the case of the Spanish silver dollars which were cast into the sea to prevent their seizure by the hostile ship of war, that ship had already placed the vessel containing the silver absolutely within its power, and with a hostile intent, and that is capture. 2 Arnold on Ins., p. 807, § 303. "Capture," says Emerigon, "is where one makes himself master of a ship in the act of war, or in the spirit of depredation, and with design to deprive the true owner of her." P. 653, § 18. It was such a demonstration of the *vis major* that the capture was virtually complete, though not a gun was fired. The money, when thrown overboard, was entirely within the power of the enemy, and hence it was held that an insurance against capture covered the loss.

"If," says Bayley, J., "the dollars had not been thrown overboard, it is clear that they would have fallen into the hands of the enemy, for the ship was, in point of fact, taken." See 3 B. & A. p. 403.

Emerigon, the father of that branch of insurance from which the doctrine was derived, states several cases which have been the foundation of those adjudicated in other countries. One example is sufficient: "The ship *Esperance*, being on the coast of Galicia, was chased by privateers. The captain and crew, seeing the loss of the ship inevitable, and being already in reach of shot, set fire to their vessel, threw themselves into their launch, and took refuge on shore. The insurers were condemned to pay the loss by sentence of the admiralty of Guienne, rendered 20th July, 1747, and this sentence

was affirmed by arrèt of the Parlement of Bordeux, 7th December of the same year." (*Emerigon*, p. 352, c. 12, sec. 18.)

The reason of the rule as given by *Pothier* on reviewing *Emerigon's* cases, is "*because confessedly if the ships had not been destroyed by the captain their capture had been inevitable*"; which is obviously the true reason for the rule. *Emer. Supra*, p. 353.

So in *Insurance Company* v. *Boon*, the Confederate army had defeated the Federal army in Glascow when the military stores in the City Hall were destroyed by fire in order to prevent their falling into the hands of the enemy, who would certainly have seized them, and the loss was held to be caused by the Confederate army. The destruction of the military stores was produced by fire, but the loss of the stores as military prize had already in effect been accomplished by the capture of the city.

By the capture of Richmond the loss of the military stores of the Confederacy and the tobacco was as certain and imminent as in that case, and no circumstance is perceived which calls for a different application in these cases of the rule there illustrated. But if the cause of the loss was the invasion of Richmond, then, as the army of the United States was not a "foreign enemy," the loss was not included in that excepted peril, and there should be judgment in the Græme case and a decree in the Vial case for the plaintiff in error.

The only circumstance, it is submitted, which distinguishes these cases from *Insurance Company* v. *Boon* is the strong agency of the wind in extending or transporting the fire to the insured buildings. And the effect of this difference is to raise the question whether the supervention and force of the wind operated as a new and intervening agency between the invasion and the

loss, sufficient to stand as the cause of the loss. If, as defendant contends, the action of the wind was merely to extend the area of conflagration by augmenting its progress, then it was an immaterial circumstance in producing the loss, which would have occurred without it, as was held to be the fact in *Tweed* v. *Ins. Co.*, 7 Wall.

If, on the other hand, it was the supervention of a new and efficient cause of the loss, the result would be the same; for though the defendant corporation insists that by force of construction "earthquakes and hurricanes," as well as "foreign invasion" "and civil commotion," and what not, can be lifted up from chaotic concealment and transported into the policies, it has not heretofore contended that it could by a similar process raise the wind into the same place. If therefore the fire was communicated to the insured buildings by that element as a new and intervening agency sufficent to stand as the cause of the loss, recovery for that loss must be accorded to the insured.

We therefore upon the whole, respectfully ask that the action of the court below be reversed and judgment in the one case and a decree in the other be entered by this court for the amount of the several policies, with interest from the 3rd day of April, 1865, until paid.

JOHN HOWARD,
Of Counsel for Appellants.

RICHMOND, Nov. 10, 1884.

112-27B

SUPREME COURT OF THE UNITED STATES.

ROBERT GRÆME, EX'OR OF JOHN GRÆME, DEC'D
vs.
THE MUTUAL ASSURANCE SOCIETY, OF VIRGINIA. } No. 1049.

&

WELLINGTON GODDIN, EX'OR; OF S. P. VEAL, DEC'D
vs.
THE MUTUAL ASSURANCE SOCIETY, OF VIRGINIA. } No. 1050.

MOTION FOR CERTIORARI.

This motion is based upon a suggestion of the diminution of the record, because the petition for a rehearing, filed in the court below, is not certified to this court along with the record, and as part thereof.

The facts as set forth in the statement accompanying the motion are, that after the Court of Appeals of Virginia, had made a decree confirming the decree of the Chancery Court, and the judgment of the Circuit Court of the City of Richmond, in the above causes the plaintiffs filed in said court a petition for a rehearing of the case presented by them, for the reason set forth in said petition. The clerk of the court, thinking that the petition for rehearing, thus filed by plaintiff, was not a part of the record of the cause, refused to certiy it, and plaintiffs now move this Court for a writ of certirorari to bring said petition into this Court, because it is a part of the record, and because upon said petition are presented questions that are material to a proper understanding of the case made by them upon their pleadings.

In the case of Steines *v.* Franklin Co., 14 Wallace, p. 15, this court caused an application for a rehearing to be brought from the court below upon a certiorari. It is true that the court held that the "necessary jurisdictional allegations cannot properly be introduced for the first time on a motion for a rehearing, as the motion itself is one addressed to the discretion of the court, and one in which the decision of the court, in granting or refusing it, is not the subject of review in the Appellate Court;" but, it is also true, that the court first required that the application for a rehearing should be before it, as a part of the record of the case below.

In this case it will be seen that the jurisdictional question does not appear for the first time in the petition for a rehearing. The case is really decided upon that question. In the court below it is made the main issue in the case, and it is submitted that these facts, bring the case exactly within the ruling of the case cited.

This court has never refused, as far as the reports show, to bring before it, by writ of certiorari, any paper that can be shown to be part of the record of the cause; the only question ever raised being whether the paper is in fact part of the record.

Ellsworth, Justice, says: in Fennemore *v.* The United States, 3d Dallas, 360:

"It is the duty of the clerk of the Circuit Court, to return the writ of error, and the writ of error is not returned, unless all the proceedings in the case accompany it."

Whether the paper sought to be brought up by a certiorari, as the petition for rehearing in this cause is in due form or not, whether it was properly and formally filed: whether there are proper parties to it, and, whether the action of the court upon it disposes of it so as to put it out of the reach of this court upon the hearing of the cause in error, are questions that do not concern us now they must be postponed until the court can inspect the petition for rehearing in connection with the rest of the record.

The fact that there is not presented any Federal question in the previous pleadings, is no objection to the motion for a certiorari in this case.

What evidence there is that no Federal question is presented in the previous pleadings in the case, or that the writ of error was improvidently awarded, does not appear anywhere in anything that is before the court. Suppose it is true, that the record in the case is defective in that it fails to present a Federal question, (which is by no means admitted,) does that preclude the plaintiffs in error from showing by the petition for a rehearing, (if it is part of the record,) that such a question was distinctly presented to the court below, and was by that court decided, indeed that the case now before this Court was decided by the court below upon the Federal question, and upon that alone.

In the case of the Bridge Proprietors *v.* Hoboken Company, 1 Wall, 116 the court says: "Although there are decisions in which it is said that the point raised must appear on the record, and that the particular act of Congress, or part of the Constitution, supposed to be infringed by the State law, ought to be pointed out, it has never been held that this should be done in express words. But the true and rational rule is, that the court must be able to see clearly, from the whole record, that a certain provision of the Constitution, or act of Congress was relied on by the party who brings the writ of error, and that the right thus claimed by him was denied." And one of the rules laid down by Judge Story, in Crowell *v.* Randall, 10 Pet., 368, is "that it is not necessary that the question should appear upon the record to have been raised, and the decision made in direct and positive terms, *ipsisimis verbis*; but that it is sufficient if it appears by clear and necessary intendment, that the question must have been raised, and must have been decided in order to have induced the judgment." Mr. Phillips, in his practice, p. 117, comes to the conclusion that the act of Feb. 5, 1867, has changed

"the manner in which the jurisdictional question is to be made to appear; and the omission of the requirement in the act of 1789, was designed to work this change, (of which he is not satisfied,) then the court is hereafter to determine its jurisdiction by evidence dehors the record," and see Murdoch *v.* City of Memphis, 20 Wall. 615, 617, 633.

This Court, in Twitchell *v.* Commonwealth, 7 Wall. 321; Buell *v.* Van Ness, 8 Wheat. 312; and in Gleason *v.* Florida, 9 Wall., 779, have held that there is no danger that a writ of error, in cases like this, will be hastily or erroneously asked, since such writ must be allowed either by the presiding judge of the State court, or a Judge of the Supreme Court of the United States, after examination of the record.

W. B. WEBB,

Of Counsel for Appellants.

112-278

IN THE

Supreme Court of the United States,

AT WASHINGTON, D. C.

VIAL'S EX'OR
vs.
MUT. ASS. SOC. OF VA.,

AND

GRÆME'S EX'OR
vs.
SAME.

Note on petition for certiorari, and reply to the brief of appellees' counsel upon the motion to dismiss these causes for want of jurisdiction.

The writ of *certiorari* is the appointed mode to bring up any part of the record which has been omitted by the clerk of the court below, or of this court. The first question which arises now is, what is the meaning of the word record? which is the English word taken from the Latin word *recordo*, to record—that is, to write down what has occurred in the court below, and means all that did occur, and does not mean only the judgment of the court upon the main point; thus, for instance, a motion to instruct a jury or a commissioner is properly and necessarily recorded as a part of the proceedings of the court in the case, and a decision of the court not to instruct presents an unintelligible case unless the instruction rejected is recorded; but the instruction not granted is in truth the motion from the counsel who offers it, and therefore I take it for granted, as a settled thing, that whatever motion in writing from the counsel which presents the point which is material to be decided ought to be recorded, and therefore it is, or ought to be, a part of the record. Now, to apply the case at bar, what-

ever point affirmative or negative ought to be recorded as necessary to show the whole of the case. A written motion to rehear the cause is in the nature of a bill of review, alleging that the court has erroneously decided an important point. The judgment of the court is a part of the record; but how can this court tell how the court decided upon that motion unless the motion itself is recorded? Suppose the case of a decision by the court below, which is corrupt upon its face, or may be, or is upon the case *coram non judice*, how can this court correct the error, or decide the judgment is right, unless it knows what was the case before the court below when it decided right or wrong unless it knows what case was presented? Can that ever be said to be a proper record of the case, which means a proper record of the proceedings in the case, if any part of it is omitted at the clerk's whim, or anything else but a partial record of what occurred, made up according to the partiality or ignorance of the clerk? It is now the settled rule of this court to decide upon the whole case what was necessarily decided by the court below. Is it not necessarily, therefore, limiting and restricting this court very improperly and necessarily to exclude from its consideration any part of the proceedings of what occurred in the court below? There is nothing in the idea of the uncertainty and looseness in not requiring proceedings to be recorded, because I limit it to what is in writing. The maxim of the law is: "*Id certum est, quod certum reddi potest.*"

How much better then is it to say, *Id semper certum est quod scribendum est?* I have shown what evils may result, what injustice may be done by leaving it to the caprice, partiality, or ignorance of a clerk (who is always conceited to a most distressing degree,) to record or write down what he pleases, instead of requiring him truthfully to write down all that occurs between the court and the parties in the trial of a cause. It is only by that rule that a motion to continue a cause, or a motion to instruct a jury, is recorded; and when a bill of exceptions is taken to the ruling of the court, what prevents

the clerk from not recording it, but the rule to record *all* proceedings?—and justice to the court, as well as the parties, requires it. What mischief can result from it? The party who orders a copy of the record must pay for it, and he alone can be injured by making it too large, and so of the printing.

The lexicographic meaning of the word to "record," according to Webster, is "to preserve the memory of, by committing to writing or to printing, as to record the proceedings of a court." Now what are the proceedings of a court? The answer is that they are the written claim of plaintiff and defendant, or either of them, and the judgment of the court thereon; and the subject will always be under the control of the court, by requiring that the claim shall be brief, and I cannot well conceive anything more important to the court below and the court above than a written statement of the grounds and authorities upon which the parties found their claim.

This honorable court, in many cases, and especially in the case of Murdock against the city of Memphis, records the briefs submitted to it, in order that the grounds upon which it decided the case may more distinctly appear. I am satisfied that nobody can read the case without concurring with the honorable court in that view.

Now, as to the question of jurisdiction. The brief of the appellee's counsel seems to me to concede the whole question and I really know not how farther to argue the constitutional question, when I state, as in this case, that the court denies that there is any constitution; for there cannot be a constitutional law if there be no constitution. This court has decided, in the case of *Murdock* v. *The City of Memphis*, 20 Wallace, pp. 590 and 629, that, "omitting for the moment that part of the section which characterises the questions necessary to the jurisdiction conferred, the enactment is, that a final judgment or decree in any suit in the highest court of a State, in which a decision in the suit can be had, (when one of these questions is decided,) may be re-examined,

and reversed or affirmed in the supreme court of the United States, upon a writ of error, in the same manner and under the same regulations, and the writ shall have the same effect as if the judgment or decree complained of had been passed or rendered in a court of the United States." Now, I would respectfully ask, What would be the judgment of this court if this case came from the circuit court of the United States, and it was found that while the constitutional law was affirmed, the court below decided that it did not apply to the case, especially when (at p. 622) this court decides "chancery cases when brought here from the circuit courts, are brought for a trial *de novo* on all the evidence and pleadings in the case." Again, at page 634, this court says, "But when it appears that the Federal question was decided erroneously against the plaintiff in error, we must then reverse the case undoubtedly, if there are no other issues *decided* in it than that. It often has occurred, however, and will occur again, that there are other points in the case than those of Federal cognizance, on which the judgment of the court below may stand; those points being of themselves sufficient to control the case. Or it may be that there are other issues in the case, but they are not of such controlling influence on the whole case that they are alone sufficient to support the judgment. It may also be found that, notwithstanding there are many other questions in the record of the case, the issue raised by the Federal question is such that its decision must dispose of the whole case.

"*In the two latter instances* there can be no doubt that the judgment of the State court must be reversed, and under the new act this court can either render the final judgment or decree here, or remand the case to the State court for that purpose." And at page 636, this court decided: "But if it be found that the issue raised by the question of Federal law is of such controlling character that its correct decision is necessary to any final judgment in the case, or that there has been no decision by the State court of any other matter or issue which is sufficient to maintain the judgment of that

court without regard to the Federal question, then this court will reverse the judgment of the State court, and will either render such judgment here as the State court should have rendered, or remand the case to that court, as the circumstances of the case may require." I confess that to my mind these authorities are conclusive of the case; but if they are not, the case of Williams and Bruffy, 96 Otto, completely shuts it up. That case decides: "1. The Confederate States was an illegal organization, within the provision of the Constitution of the United States, prohibiting any treaty, alliance or confederation of one State with another. Whatever efficacy, therefore, its enactments possessed in any State entering into that organization must be attributed to the sanction given to them by that State. 2. Any enactment, from whatever source originating, to which a State gives the force of law, is a statute of the State, within the meaning of the act regulating the appellate jurisdiction of this court over the judgments and decrees of the State courts. 3. An enactment of the Confederate States, enforced as a law of one of the States composing that confederation, sequestrating a debt owing by one of its citizens to a citizen of a loyal State as an alien enemy is void, because it impairs the obligation of the contract, and discriminates against citizens of another State. The constitutional provision, prohibiting a State from passing a law impairing the obligation of contracts equally prohibits a State from enforcing as a law an enactment of that character, from whatever source originating." The acts of the Confederate Congress directing the tobacco of all citizens to be burnt, to prevent it from falling into the hands of the United States, was illegal and unconstitutional, and violated the contract of the insurer and insured; and the decision of the court affirmed it, and, therefore, the decision was unconstitutional, if there was a constitution. And if it can only be avoided by abolishing the constitution, it is still worse, if possible. There was no question decided by the court of Virginia which could sustain the defence. *Arguendo en*

passant, the opinion says, that the fire was not accidental because it proceeded from the fire ordered by the Confederate Congress. This is no decision of a separate point; but if it were, it is too absurd to merit serious consideration; but there is an anomaly about this case not to be found, I am glad to say, in any other case of record—that a court of chancery pronounces a judgment at law erroneous, and yet affirms it.—(Græme's case.) Will this honorable court send out such a raw-head and bloody bones without its condemnation?

Respectfully submitted by

JAMES LYONS,

Counsel for the Plaintiff in Error.

Cost of printing, $6.

112-273

In Supreme Court of the United States.

Nos. 1049, 1050.

GODDIN, Executor of VIAL,
AND
GRÆME, Executor of GRÆME,

vs.

THE MUTUAL ASSURANCE SOCIETY OF VIRGINIA.

Motion to dismiss, with motion for affirmance.

Supplemental Brief for Appellants.

The argument for the appellee, in this motion, proceeds, with all deference be it said, upon an entirely erroneous conception of the decision of the Court below. Counsel have cited portions of the opinion of the Court, but have failed to call attention to the real grounds upon which the Court bases its final conclusions. The judgment of the Virginia Court of Appeals is thus expressed by the Justice announcing that judgment (see Printed Record, p. 98):

"Now the facts already cited show conclusively that the fire resulted from an invasion of this city. It was caused by the military orders executed under a statute requiring all property such as cotton and tobacco and naval and military stores to be burned at the approach of the enemy. The destruction of such property is one of the means of defense which any nation has a right to use, and is as legitimate as any other means of warfare. For instance, the

burning of Moscow was an efficient means of repelling the invader, and the army of Napoleon was destroyed by that act more completely and disastrously than by a hundred battles.

"And so in the case before us: The destruction of the property ordered to be burned by the military authorities was a means of repelling the invader, and was directly consequent upon the invasion. In other words, the fire was directly caused by, and was in consequence of, the invasion. If there had been no invasion there would have been no fire. The fire resulted, therefore, directly from the invasion.

"I am, therefore, of the opinion that the stipulation in the policy protects the company, and that it is not responsible for any loss or damage occurring from such a fire."

There can be no mistake as to the ground upon which the court puts its decision as to the responsibility of the Assurance Society after perusing the above sentences. This decision and the judgment based upon it proceed entirely upon the doctrine announced by the court that the Government of the United States was a foreign invader, and its troops as much foreign enemies as if they had been part of the army of a European government.

And again (printed record, page 96,) the Court of Appeals of Virginia designates the authority under which the fire was originated, from which the destruction of the property in question in this case resulted.

"The action of those officers was in accordance with military orders received by them, and those orders were in accordance with an act of Congress of the Confederate States of America, passed March, 1862, entitled, 'An act to regulate the destruction of property under military necessity, and to provide for the indemnity thereof.' This act will be found at large at page 86 of the printed record. The Court proceeds: 'From the evidence quoted, and the act of Congress above referred to, it is plain that this fire, by which appellant's buildings were burned, resulted from the act of these military officers, acting under express orders and by virtue of an act of Congress of the Confederate States of America.'"

Now, plainly the court below decides that the Assurance Society is relieved from responsibility under its contract with these appellants because the fire which occasioned the destruction of their property resulted "from the invasion of a foreign enemy," and that such fire was the act of officers of the Army of the Confederate States of America acting under military orders, in accordance with an act of the Congress of the Confederacy, passed to authorize and regulate the destruction of private property. Of course the destruction of the property of appellants can only be justified by sustaining the validity of the acts of these officers and of the act of Congress from which they derived their authority thus to destroy the property of private citizens. It is submitted that the jurisdictional question plainly arises here and has been erroneously decided.

Murdock vs. *The City of Memphis*, 20 Wall., 590;
Williams vs. *Bruffy*, 96 U. S., 176.

But it is contended that the court below has decided in this case another question over which they had undoubted jurisdiction, which question fully disposes of the case. In support of this, it is urged that the court decided that the fire was not accidental, which it had a perfect right to do, and also that it arose from "civil commotion." With respect to the first of these points, it will be seen, upon examining the opinion of the court, that the decision is that the fire was not accidental, because it occurred by foreign invasion. Had an ordinary incendiary applied the torch, no question could have arisen as to the Assurance Society's responsibility; it is because it is the act of a "foreign enemy" that it takes the character it would not otherwise have. The court says: "If there had been no invasion there would have been no fire; the fire resulted, therefore, directly from the invasion." It is submitted, there-

fore, that the argument that the fire was not accidental, because it "resulted from the invasion of a foreign enemy" can have little force until it is finally determined that the fire did really result from the invasion of a foreign enemy.

And again, as to the question whether the Assurance Society is protected under the claims in its contract exempting it from losses which may result from 'civil commotion.' Without going into the question of what constitutes civil commotion, which is very summarily disposed of in the opinion of the dissenting judge of the Virginia Court of Appeals (Printed Record, p. 103), it will be enough to see what the court does decide on that point. On pages 96 and 97 of the printed record, the Court says:

"Unquestionably the company intended to protect itself against all losses, except by accidental fire; and in the contract of insurance they used terms that would seem to embrace every conceivable condition of affairs except accidental fire. I suppose that civil commotion must necessarily arise when there is civil war. It is true there may be civil commotion without civil war, but certainly there cannot be civil war without civil commotion, and I think no man who lived in the last decade would say there was no *civil commotion* between 1861 and 1865."

And this is all the Court does say on this subject. It is impossible that counsel can argue seriously that in these sentences there is to be found a decision of the court below of a question other than the jurisdictional question, upon which a judgment can be founded in this case.

W. B. WEBB,
of Counsel for Appellant.

112-276

SUPREME COURT U.S.
FILED
DEC 3 1888

IN THE

Supreme Court of the United States.

GRÆME'S EXECUTOR, AND VIAL'S EXECUTOR,

vs.

"THE MUTUAL ASSURANCE SOCIETY AGAINST FIRE ON BUILDINGS OF THE STATE OF VIRGINIA."

Brief for the Appellants.

The testators of the petitioners insured in the said Society a large amount of property anterior to the late war, which was burnt down by the great fire of 3d April, 1865.

The first cause of the said fire was the order of the late Confederate Government to General Lee, to burn up all the tobacco which was in the city of Richmond, *and which might be in danger of falling into the hands of the troops of the United States.* General Lee proceeded on the day mentioned, by his subordinates, with great care and caution to fire a certain warehouse in Richmond, in which tobacco was stored. The morning was very still and calm, but a strong wind set in after the tobacco was fired, which blew the fire from other intermediate buildings to the buildings of Græme and Vial respectively, at a great distance, to-wit, 1500 yards, and consumed them entirely.

The suit of Robert Græme, executor, was an action of covenant in the circuit court of law of the city of Richmond; and that of Wellington Goddin, executor, was a suit in the court of chancery of the city of Richmond.

The defendant Society defended itself severally upon these grounds, to-wit:

1. That they were not liable for the claim, because, by the 12th section of the Xth article of the rules and regulations of the Society, they are exempted from liability for damages by fires which may be occasioned by *civil commotion, insurrections, the invasion of a foreign enemy*, etc.; and they say that the fire in this case was caused by one or all of these causes.

2. If it was not, the plaintiff is estopped to claim the damage by the fact that John Græme erected other buildings upon the lot upon which his burnt buildings stood, and insured them in the office of the defendants, and was allowed credit for part of the premiums paid upon the former buildings, for the time which elapsed after the fire, and before the expiration of the year.

3. Because he *waived* his right to claim his damage, by his omission to take the preliminary steps, and offer preliminary proofs.

The circuit court of Richmond decided the cause in favor of the defendant at law, upon the ground of *estoppel* merely, and did not consider any evidence not applicable to that point.

The chancery court of Richmond, in the case of Vial's executor, decided the cause upon the ground that there was an *invasion* within the meaning of the 12th section of the Xth article of the by-laws before cited, and gave a decree in favor of the Mutual Assurance Society.

By consent of the parties, by their counsel, the case of Vial's executor was heard upon a case agreed. A copy of the record in that case is herewith submitted; and a copy of the arguments upon that case in behalf of the appellants, marked No. 1 and No. 2, are herewith submitted.

The chancery court, it will be found, decided the cause upon the ground of invasion, but at the same time (p. 78 of record, in Vial's case,) decided that the troops of the United States, which took possession of the city of Richmond upon the morning of the 3d of April, 1865, were

"*foreign enemies*," and that the firing of the tobacco warehouses by the Confederate government was an *act of war*.

A copy of the record in the case of Græme's Ex'or, with the petition of appeal upon it, and a copy of the argument for the appellant, are herewith filed, marked No. 3 and No. 4.

The Supreme Court of Appeals of Virginia heard the cases *together, by agreement for convenience*, and that court decided that the judgment of the circuit court of law of the city of Richmond was *erroneous;* but it decided, nevertheless, that that judgment should be *affirmed*, as well as the decree of the chancery court of Richmond, upon the ground that the *invasion of Richmond*, as it was termed, by the troops of the United States, was the act of "*a foreign enemy*," and therefore brought the cases within the 12th section of the Xth article of the by-law upon which the appellees relied, although that section and article were no part of the policy, nor annexed to it, nor even referred to in it, and were made after the first policies were issued, without any rightful authority in the Society (without a new statute) to make them, and although the language of that article cannot by any distortion be made to apply to the *civil war* between the States of the United States, which occurred after the year 1861, or in that year. The Legislature alone had the right and authority to say for what the Society should be liable, and it is not possible to believe that when the charter was granted, and even when the by-laws were passed, it intended to embrace the United States by the term "*foreign enemy*," when this State was in full accord with and a member of the United States; nor is it at all reasonable to suppose that the Legislature would expose the citizens to all the losses which the people might sustain from a "foreign army" by incendiarism, although there might never be a battle, and no injury by a battle. Moreover, Virginia has, by her fundamental law, or present Constitution (Art. XI), declared the late war to have been a "*civil war*," and the Congress of the United States, by its act ratifying, approv-

ing and confirming the said Constitution, also affirmed the same thing, that is, that the war was a "*civil war*." The decision of the supreme court of Virginia, therefore, disaffirmed and repealed an act of Congress.

Every public press of this country and England, except that of the Yankees—and some even of them,—affirmed that the war was a civil war; and Justin McCarthy, in his late work (which is very able and interesting), which is entitled "The History of Our Own Times," speaks of it as the great civil war; and it falls precisely within the definition of civil war as given by Wheaton, p. 520, and notes.

It was utterly inconsistent with the ordinary meaning of the words "and the truth" to affirm that that was an act of war by a foreign government or a foreign, army when that army entered the town as a friend by consent of its own authorities, and it was proved to be mainly instrumental in extinguishing the fire instead of creating it.

If that was a foreign army, then it was the army of a foreign government; and the question necessarily arises, What foreign government? And the question also arises, For what did this foreign government fight the Confederate government? Was it to compel the Confederate government to become a part of the foreign government? Where, in the history of civilized warfare, has such a war been waged, unless between Russia and Turkey, when the allies invaded the Crimea to protect Turkey from the dominion of Russia? Wellington fought Napoleon, not to compel him to become a part of the British government, but to deprive him of the power, as emperor of the French, to make war upon England, or any other nation, it being supposed that universal empire was his aim. If the United States army was a foreign army, then the Confederate government was an independent government before the war; and how unjustifiable and absurd were all the laws and resolutions of congress declaring the constitution restored; and how absurd and unjustifiable were all the amendments to the Constitution; and what an act of lawlessness and felonious act

of power was the abolition of slavery in the Southern States if we were foreign to the United States! And if they were not foreign to the United States, the army of the United States was not foreign to them.

By the original charter of the Society it was made responsible for all losses by fire without exception, *except fires occasioned by the agency, directly or indirectly, of the insured.*

It will be distinctly seen that no power was given to the president and directors to say, or declare, for what losses the Society should be liable, in the language of the 10th section of the law, amending the charter, passed in the year 1805, for that section declares "that the said president and directors shall have power to form [which means *make*] such rules and regulations for *transacting the business* of the Society," etc. This language not only does not give the power to amend the law by defining new risks or repealing old ones, but clearly makes the president and directors *mere managers, or executive agents, and not the insurers.*

This decision of the court took the appellants utterly by surprise, inflicted upon them great loss and injury, and is wholly erroneous, as they insist. A copy of it, and of the *Dissenting Opinion* of the Honorable Judge Anderson of the same court, are herewith filed, marked No. 6 and No. 7. The Honorable Judge Burks also dissented, but gave no written opinion. From that decree the appellants filed a petition, praying for a re-hearing of the cases, in which, among other errors of the said decree of which they complained, the appellants relied upon the ground that the decision that the army of the United States was a "*foreign enemy*," and the United States was a "*foreign nation*," was contrary to the Constitution of the United States and to the decisions of this honorable court, especially in the case of *Williams & Arnett* v. *Jason & Bruffy*, decided at the October term, 1880.

The appellants were taken utterly by surprise by this decision, because, from the very commencement of the cause,

they had insisted that *the wind was the proximate cause of the fire*, and the defendants had insisted upon an invasion by the United States army, and that the burning of the tobacco was an act of war, *not foreign war*, by the Confederate government; and it never occurred to either party to imagine that the Constitution of the United States had been abolished, but supposed it was decided *by the event of the war* whether it was or not; and such was the opinion of the whole country. The appellants also relied upon the grounds that there was no *invasion* by the army of the United States, because it came into Richmond by the consent of the municipal authorities *after a capitulation had been made*, and it was mainly instrumental in extinguishing the fire.

A copy of the petition is herewith filed, marked No. 8. But the court overruled the motion, and refused to re-hear the causes; thus reaffirming its decision that the army of the United States was the army of a "*foreign enemy*," and that the United States was a "*foreign nation*." Copies of the judgment of the court of appeals in each case are herewith filed, marked Nos. 9 and 10.

As something may be said upon the question of the jurisdiction of this honorable court, the appellants beg leave to submit the following considerations and authorities as vindicating conclusively the jurisdiction of this honorable court.

The decisions of the supreme court are that the Federal question must appear in the pleadings. Then the question is, What is the meaning of those decisions? They plainly do not refer to the argument *ore tenus;* because, being *ore tenus*, they could not appear on the record. They do not refer to the written arguments either; because they are not a part of the record. The obvious meaning is, that they must appear in such form as to show that the court, in its decision, necessarily decided against the law, or constitution of the United States. If, therefore, nothing appears in any part of the record, the court decides that if the party plaintiff or defendant claims under the constitution or law of the United States, he shall not have the protection of

either. Is it intended thereby to affirm that the Federal question does not appear upon the record, when it is expressly decided by the court that therefore the court cannot take notice of it, although the object in saying that it must appear by the pleading is only the means of making it clear that the court below had decided the Federal question? If it is, it is a profound witicism or an unintelligibly stupid blunder, and is the rarest illustration that ever has been given of the *lucas a non lucendo*. When, therefore, the court below, by its decision, crushes the Federal question so that it never can be relied on or enjoyed by the party, it complies with the decision of this honorable court. Thus, for instance, if it decides that there is no constitution of the United States, it necessarily decides that the party plaintiff or defendant cannot now have or have had the benefit of a law made under the constitution of the United States. But it is said that the question cannot be made in a motion or petition for re-hearing; because it will not appear that the court has decided the question. When, however, the court expressly decides the question in a written opinion, this objection is answered by anticipation, as I have shown in the previous part of this argument.

The judgment of the supreme court of appeals of Virginia, in fact and law, denies that there is any constitution of the United States, or government under it; for it decides that it is a "foreign government," when it decides that its army is the army of a "foreign enemy;" and any attempt to argue that it has violated any law of the United States, or the expressed decision of its supreme court, we feel would be very much like those of whom it was said, by a Latin poet, that they were *rara nantes ingurgitevasto*, or small swimmers or sailors in a vast gulf without rudder or compass. Argument is exhausted when it is said that there is no government of the United States; for there can be no law of the United States, and no supreme court of the United States, and no United States, if there be no constitution of the United States under which, and by authority of which, to make laws and estab-

lish courts. Archimedes is said to have declared, that if you give him a fulcrum, his lever would overturn the world; but the man who says that there is no such thing as matter, denies, in the most emphatic manner, that there can be a fulcrum. The man who in effect, or in terms, denies the constitution of the United States, is more emphatic than he who denies the existence of matter, and he allows no fulcrum upon which the friends of liberty and law could plant their lever with which to overturn, by law, tyranny and despotism; for matter cannot be entirely destroyed, but the constitution may be. And this is equally true, whether in a political sense or not; for if the government lasts there can be *politically* no foreigner, or by necessary consequence there can be no *treason*, if it be true that fighting for the United States, in the army of the United States, against the army of a State or States, constitutes both parties *foreigners;* then the constitution is at an end, and that *clause* which authorizes the United States to punish armed resistance to the United States, and to quell insurrections, is void, and the supreme court of the United States was wrong in the case of *Williams & Arnett* v. *Jason & Bruffy*, already cited. What political right can be conceived of to constitute the parties belligerent, or either of them *foreigners?* The Confederates were not made independent, for the most ordinary political right which they could have was to say what their own currency should be; but the supreme court and congress both said that they had not that right, because the constitution of the United States declared that no State (nor, of course, several States,) should make anything but gold and silver a tender for the payment of debts; and Congress declared that the Confederate States should never pay any of their *war debts*, and so amended the constitution. How is it possible to conceive, then, that they had any political rights, when they could not give their own notes in valid payment of a past debt, nor even for present need? And the supreme court of the United States decided, in the case of *Williams & Arnett* v. *Mason & Bruffy*, that Confederate money was

illegal and void and unconstitutional, and should not be given in payment of debts, the decision of the supreme court of Virginia to the contrary notwithstanding, and therefore reversed a judgment which that court had rendered, in which it held that a payment of a debt in Confederate money was a valid ~~judgment.~~ payment.

The supreme court of the United States decided in the *Prize Cases*, Wallace, that the government of the Confederate States was nothing in the world but a government *de facto;* then they could make no law of any kind, even for defence. Then I think I may ask what political rights they could have? and so the other side, the United States, how could they acquire any political rights by fighting or by peace?

JAMES LYONS,
Counsel for Plaintiffs in Error.

112-273

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM—1884.

ROBERT GRAME, EX'R OF THE ESTATE of JOHN GRAME, deceased,
Plff. in Error.

vs. No. 95.

THE MUTUAL ASSURANCE SOCIETY OF VIRGINIA,
Defendant in Error.

AND

WELLINGTON GODDIN, EX'R., &C., OF S. P. VIAL, deceased,
~~*Appellant.*~~

vs. No. 96.

THE MUTUAL ASSURANCE SOCIETY OF VIRGINIA,
~~*Appellee.*~~

Brief for ~~Appellant and~~ Plaintiff in Error.

WM. B. WEBB,
ENOCH TOTTEN,
For the Plaintiff in Error ~~and for the Appellant~~

E. O. POLKINHORN & SON, PRINTERS.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM—1884.

ROBERT GRAME, EX'R OF THE ESTATE OF JOHN GRAME, deceased,
Pltf. in Error.

vs.

THE MUTUAL ASSURANCE SOCIETY OF VIRGINIA,
Defendant in Error.

No. 95.

AND

WELLINGTON GODDIN, EX'R., &C., OF S. P. VIAL, deceased,
~~*Appellant,*~~

vs.

THE MUTUAL ASSURANCE SOCIETY OF VIRGINIA,
~~*Appellee.*~~

No. 96.

Brief for ~~Appellant and~~ Plaintiff~~s~~ in Error.

~~One of~~ These causes ~~is~~ are brought here on ~~a~~ writ~~s~~ of error ~~and the other by appeal, from~~ to the Supreme Court of Appeals of the State of Virginia; they involve the same question and will, by leave of the Court, be argued together as one case.

Statement of Facts.

These causes are based upon policies of insurance against fire, issued by this Insurance Society to the testators of the plaintiffs in the court below. There are three policies in the case of Goddin, executor, (15, 17, 20,) and one in the other case (5). The latter bears date December 31, 1858, and the other three are dated, respectively, February 19, 1856, October 25, 1858, and December 31, 1858; they were all regularly continued by the payment of premiums, from time to time, until the date of the fire hereafter mentioned. The buildings covered by these policies were destroyed by fire a little before sunrise, on the morning of the 3d day of April, 1865. The policies are in the same language, and by each of them, the society bound itself as follows:

> "To pay, agreeably to the acts of the Legislature of Virginia, and the Constitution, rules and regulations, which are already or may hereafter be established for the said Assurance Society, unto the said assured, or to his heirs, executors, administrators or assigns, all such losses or damages as shall happen *by fire* or lightning after 12 o'clock M. of this day, to the above mentioned buildings, according to the *true intent and meaning of the said acts of the Legislature of Virginia, and the Constitution, rules and regulations of the said Society aforesaid.*"

It is contended, but not conceded, that the rules and regulations of the society contain provisions to the effect that the society shall not be liable "for losses which may result from riots, civil commotions or insurrections, from the invasion of a foreign enemy," &c., &c.

The fire which destroyed the buildings, so insured, occurred in the following manner:

Sometime prior to the afternoon of Sunday, the 2d day of April, 1865, the military authorities of the Confederated

States in rebellion, then in exclusive control of the city of Richmond, determined to evacuate that city. The military provost marshal representing that organization, had, some weeks before been instructed in the event of the forced evacuation of the city, to destroy all tobacco, cotton, military and naval stores. On Sunday. the 2d of April, 1865, the necessity having arisen, he was ordered to carry out these instructions. On the day before the fire, this officer was ordered to remain in the city, with his command, whatever it was, as long as he could do so with safety, and then to set fire to two warehouses, called Shockœ warehouse, and Van Groning's warehouse, which buildings contained a large part of the tobacco then in that city. He ordered that the two warehouses be ignited, and it was accordingly done, about or a little before daybreak, on Monday, the 3d day of April, 1865. The night was remarkably still and quiet, but soon after the fires were started, the wind began to come up, and blow from the southeast to the northwest, and it gradually increased in violence until its force was great enough to carry large coals of fire a distance of one thousand feet, or nearly one fifth of a mile. (See R., in 95, pp. 9 and 10.) The property of Grame was distant from the Shockœ warehouse three or four squares with a broad street, called Cary street, intervening. By force of this violent wind the fire was extended from the Shockœ warehouse to the property of Grame, so insured. It seems also that the progress and spreading of the fire was expedited and increased by the negligence of the "fire-brigade," and by "incendiaries." (Grame, R., 12.) The exact location of the property of Vial, in reference to the fire is not shown by the record, but by the violence of the wind the fire was communicated from building to building, until it reached the property of Grame and Vial, and all became a total loss.

With the orders to destroy the warehouses containing the tobacco, orders were simultaneously given to use the utmost

care and precaution to prevent the spreading of the fire. In pursuance of the latter orders, the officer (Col. Carrington), charged with the work of destruction, notified the Fire Department of the city of Richmond to be at the place of the fire with engines and men to prevent the spread of the flames. (Ibid, p. 12.) It was also ordered that guards be stationed at each of the buildings to prevent disturbances, and this was probably done.

On Sunday, the 2d day of April, 1865, when it became known to the people that the city was to be evacuated, the municipal authorities of Richmond adopted measures to "meet the enemy" and surrender (as they termed it) the city to the army of the United States, and they appointed a committee to go out and meet the troops for that purpose. Sometime after midnight and in the early morning of the 3d of April, these citizens, including the Mayor, went out beyond the city about two miles, and there awaited the approach of a detachment of the army. When the troops reached them, "a formal surrender of the city was made." On the journey back to the city, and when about one and a half miles distant therefrom and about sunrise, they discovered that the tobacco warehouses were on fire. The Federal forces soon afterwards took possession of the city, and about one o'clock of that day they succeeded in extinguishing the fire.

The destruction of these warehouses, with their contents, was ordered by the military authorities of the Confederacy in obedience to the mandate of what the Court of Appeals of Virginia is pleased to term an act of "Congress of the Confederate States of America," approved March 17, 1862. (Goddin, R., p. 86.) This "act" directed the military authorities of the Confederate army "to destroy cotton, tobacco, military and naval stores, or other property of any kind whatever which may aid *the enemy* in the prosecution of the war, when necessary to prevent the same or any part

thereof from falling into the hands of the *enemy*." (See Goddin, R., pp. 39, 96.)

In January, 1867, buildings having been erected on the several sites of those destroyed by the fire, the testator of Grame procured insurance thereon, in the office of this same society, and it seems that he was placed upon the same footing as if his buildings had not been burnt, and as if the insurance premiums had been regularly paid. At that time Grame inquired again of the agent of the corporation as to its liability for the damages caused by the fire of April, 1865. He was told that there was a "war clause in *the policies of all the Companies;* that the fire, referred to, was the result of war, and that there was no liability, as the risk was especially excepted against." (Grame, R. 15.) These circumstances furnish the ground for one of the defences in each case. In the Goddin case, the insurance on the new buildings was taken out by the lessees of the executor of Vial.

After the property of these two members of the Association so insured, had been destroyed and prior to May, 1867, the Association introduced important changes in the "terms and conditions" of insurance, and caused them to be endorsed upon the form of policy to be used in future. (See Goddin, R. 27.) The 6th paragraph of these "terms and conditions" provide that "no policy shall bind this Society for any loss or damage which may result from riots, civil commotions or insurrections, from the invasion of a foreign enemy, *or any military or usurped power* or from, &c., &c.

The defenses urged in the State Courts, in behalf of the Assurance Society were three:

1. "Because, by the 12th Section, of the Xth Article of the By-Laws, or Rules and Regulations of the Society, they were not liable for the claims for damages by fires which may be occasioned by civil

commotion, insurrection, or the invasion of a foreign enemy, etc.; and it was asserted that the fire in this case was caused by one, or all of these causes.

2. If it was not, the insured are estopped to claim the damage by the fact that they erected other buildings upon the lot, upon which the burnt buildings stood, and insured them in the office of the Society, and were allowed a credit for premiums paid on the old insured buildings, in part payment for the premium demanded for the insurance of the new buildings.

3. Because they *waived* their rights to damage, by omitting the preliminary steps, and preliminary proofs."

The Supreme Court of Appeals of Virginia, rejected the last two defenses as untenable, but decided the causes in favor of the Society on the ground that the fires resulted from "the invasion of a *foreign enemy*."

It will be contended, in behalf of the plaintiff in error ~~and the appellant~~, that the Supreme Court of Appeals of the State of Virginia, erred by deciding as stated in the following—

Assignment of Errors.

First: That the constitution and laws of the United States were not the supreme law of the land in the State of Virginia, at the time of the fire, and that the judges of the Supreme Court of Appeals of that State were not bound thereby:

Second: That the combination of States called "The Confederate States of America," which were, at the date of the fire, in rebellion against the United States, constituted a lawful government, as against the authority and to the exclusion of the United States in Virginia;

Third: That the United States was without lawful authority to march its armies into the vicinity of, or into the city of Richmond, in the State of Virginia, at the time in question;

Fourth: That the military officers of the said Confederate States were warranted, by the authority of an "act" of the said Confederate Congress, in destroying by fire the said warehouses to prevent the capture, by the armies of the United States, of the tobacco therein stored;

Fifth: That the fire which caused the damage to the property of the insured, resulted from "the invasion of a foreign enemy," and that it was therefore excepted from the risks assumed by the society.

Argument and Authorities.

I.

The first question which arises may be one of jurisdiction. Early in the October Term of 1881, a motion was made here by the counsel for the assurance society for the dismissal of these cases for want of jurisdiction. This motion was argued and submitted and the motion did not prevail, but as to whether or not the question was passed upon, or only postponed, is a matter of doubt in the minds of counsel for the assured. Therefore, we proceed as if that question was still an open one.

The appellate jurisdiction of this court in cases brought up from the highest court of a State is prescribed and limited by the Revised Statutes (Sec. 709), and for the purposes of these causes may be stated to be authorized in the following cases:

1st. Where is drawn in question the validity of a statute of, or an authority exercised under, the United States, and the decision is against such validity;

2d. Where is drawn in question the validity of a statute of, or an authority exercised under, any State, on the ground

of their being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of their validity;

3d. Where any title, right, privilege or immunity is claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under the United States, and the decision is against the title, right, privilege, or immunity specially set up or claimed by either party, under such constitution, treaty, statute, commission or authority.

In the first place, was the validity of a statute of a State drawn in question? It is true that this statute emanated from a "combination" of States, of which Virginia was one, and that it cannot be considered a "State" statute under a strict construction; but the law giving jurisdiction to this court is one for the benefit and good of the whole people and should be liberally construed. There can be but little doubt that, if the State of Virginia had not violated the Constitution by entering into an unlawful "agreement or compact" and by confederating with several other States, the plaintiffs would not have been injured. The efficacy of the objectionable law so far as it operated upon the rights and privileges of the assured, was imparted to it by the action of Virginia through these unlawful acts and combinations with other States, and the action of its courts. Suppose that two States should make an agreement, compact or confederation, and ordain a statute; would they be thus permitted to avoid the jurisdiction and controlling power of the Federal judiciary? They certainly would not, and to this effect is the decision of this court in the case of *Williams* vs. *Bruffy* (96 U. S. 176.) In that case this court was dealing with the confiscation act passed by the same authority. The Court there, uses this language:

> "Now, the Constitution of the United States prohibits any treaty, alliance or confederation by one State

with another. The organization whose enactment is pleaded cannot, therefore, be regarded in this court as having any legal existence. It follows that whatever efficiency the enactment possessed in Virginia must be attributed to the sanction given to it by that State. Any enactment, from whatever source originating, to which a State gives the force of law, is a statute of the State, within the meaning of the clause cited relating to the jurisdiction of this court. It would be a narrow construction to limit the term to such enactments as have gone through various stages of consideration by the legislature. There may be many acts authorized by the constitution of a State, or by the convention that formed it, which have not been submitted to the consideration of its legislature, yet have all the efficiency of laws. By the only authority which can be recognized as having any legal existence, that is, the State of Virginia, this act of the unauthorized confederation was enforced as a law of the commonwealth. Its validity was drawn in question on the ground that it was repugnant to the Constitution of the United States, and the decision of the court below was in favor of its validity. Its repugnancy was asserted in this, that it impaired the obligation of the contract between the plaintiffs and the deceased, and undertook to release the latter from liability, contrary to the express prohibition of that instrument."

This doctrine seems to us to be peculiarly fitting in the present case.

We assert that the jurisdiction of this court is maintainable upon the authority of each and every of those clauses.

It can hardly be denied that, in the court below, the validity of an authority exercised under the United States was drawn in question, and that the decision was against such validity, because it was asserted and maintained there that the officers and soldiers of the army of the United States were warranted by law and possessed the authority not only to "approach" the city of Richmond at the date in question, but that they had a right to march into and through it at

their pleasure. The court below decided that they possessed no such authority, and that in so doing they became a "foreign enemy," and were "invaders."

It doubtless will be urged, on behalf of the Assurance Society, that the language of the policy itself was limited by a provision in the rules and regulations of the Society; one of these, said by the counsel for the society, to be operative as a part of the policy, provides, that the society shall not be liable for losses which may result from "the invasion of a foreign enemy." We do not admit that this clause forms any part of the contract, for reasons which will be fully stated hereafter. But even if it does so operate the result must be the same touching this question of jurisdiction, because the court in order to render the decision which it did render, was obliged to hold that the armies of the United States were, at the time in question, "a foreign enemy," and denied its "right" to enter Richmond; it thereby justified the rebel authorities in the destruction of the insured premises, and denied the "immunity" claimed by the assured against pretended statutory legislation directing the armies of these Confederate States to destroy the property of the people, and particularly of the assured.

That these were the real grounds upon which the court below bases its decision of these causes, plainly appears from the following extracts from the opinion of the court, (Goddin, R. 98), to wit:

> "Now the facts already cited show conclusively that the fire resulted from an invasion of this city. It was caused by the military orders executed under a statute requiring all property such as cotton and tobacco and naval and military stores to be burned at the approach of the enemy. The destruction of such property is one of the means of defense which any nation has a right to use, and is as legitimate as any other means of warfare. For instance, the burning of Moscow was an efficient means of repelling the invader, and the army of Napo-

leon was destroyed by that act more completely and disastrously than by a hundred battles.

"And so in the case before us: The destruction of the property ordered to be burned by the military authorities was a means of repelling the invader, and was directly consequent upon the invasion. In other words, the fire was directly caused by, and was in consequence of, the invasion. If there had been no invasion there would have been no fire. The fire resulted, therefore, directly from the invasion.

"I am, therefore, of the opinion that the stipulation in the policy protects the company, and that it is not responsible for any loss or damage occurring from such a fire."

This can leave no doubt as to the ground upon which the court puts its decision touching the responsibility of the Assurance Society. This opinion and the judgment based upon it proceed entirely upon the doctrine announced by the court that the Government of the United States was a *foreign invader*, and its troops as much *foreign enemies* as if they had been part of an army of a European government.

And again (printed record, page 96,) that court points out and sanctions the authority under which the fires were lighted, from which the destruction of the property in question in this case resulted.

The action of those officers, says the court, was in accordance with military orders received by them, and those orders were in accordance with an act of Congress of the Confederate States of America, passed March, 1862, entitled, 'An act to regulate the destruction of property under military necessity, and to provide for the indemnity thereof.' This act will be found at large at page 86 of the printed record. The court proceeds:

"From the evidence quoted, and the act of Congress above referred to, it is plain that this fire, by which appellant's buildings were burned, resulted from the

act of these military officers, acting under express orders and *by virtue of an act of Congress of the Confederate States of America.*"

It was also asserted there, and it is now here asserted by the assured that the said "act" of the said combination of States called the Confederate States of America, directing the military authorities of that organization to destroy tobacco and other property, and stores, to prevent them "from falling into the hands *of the enemy*," was, and is repugnant to the constitution and laws of the United States; but the court below decided in favor of the validity of said statute, and held that it fully authorized those officers to set fire to the city of Richmond. The contract of insurance bound the society to pay for all such losses as should "happen by fire or lightning" within a time specified. That this loss did happen by fire there is no question, but the courts of Virginia held that being the result of an act of war, which was authorized and directed by this Statute, that the contract did not cover the risk. If the fire had been the result of the work of an *ordinary* incendiary the policy would undoubtedly have been held to include the loss. Hence, the "act" of the Confederate Congress as construed by the court below impaired the obligation of these contracts.

It is therefore submitted that the jurisdiction of this court is fully authorized by each of the three clauses of the statute above mentioned.

II.

As before mentioned three defenses against these suits were set up and relied upon by the Assurance Society, that is to say, that no proofs of loss were submitted or furnished; that other buildings were erected on the old sites, and new policies issued thereon by the society, and that reductions of

premiums were made to and accepted by the assured, because of the old policies, and that the losses complained of were not included in the risk assumed by the company. It is deemed unnecessary to discuss the first two of these defenses, because they were by the court below, decided favorably to the plaintiff in error and the appellant, and they are so plainly untenable that we are willing to submit them on the records without argument. The third defense was sustained by the court below.

Among the "rules and regulations" of the society, as we are informed by the printed pamphlet containing them, and the legislative enactments, which were in force "on the 1st October, 1856, "are the two following sections, to wit:

> SEC. 11. Buildings insured by this society, are only insured against such losses or damages as may be occasioned by accidental fire, or by lightning.
>
> SEC. 12. No policy whatever which may be issued shall bind the Society to answer for losses which may result from riots, civil commotions, or insurrections, from the invasion of a foreign enemy, from hurricanes or earthquakes, or from the direct or indirect agency of the proprietor of the building which may be burnt.

1. In the court below much importance was given to these two sections of the rules and regulations. The court held that they constituted a part of the policies; the assured contended then, and assert now, that they were repugnant to the statutes constituting the charter of the Assurance Society. In this view of the case the justice who wrote the dissenting opinion, in the court below concurred.

We submit to the court that these two sections, just quoted, constitute no part of the contract of assurance. The original statute of incorporation, and several of the amdedments especially grant power to the society to make rules and regulations. These will be found with the statutes

which are printed, together with the rules and regulations, in a separate pamphlet.

These statutory powers and the rules and regulations are fully stated and commented upon in the able dissenting opinion of Mr. Justice Anderson (Goddin R., 100) in the court below, and we deem his arguments so conclusive that we content ourselves with copying that part of his opinion in the very words of it:

> "The company resists the claim upon various grounds, some of which involve the merits of the claim, and others of a technical character, which, impliedly admitting the justice of the claim, seek to avoid it upon other grounds. The court being unanimously of the opinion that the defence cannot be maintained upon these latter grounds, I will proceed at once to consider the case upon its merits.
>
> "In all of these policies only four-fifths of the value of the buildings are insured. Each policy contains a covenant on the part of the Mutual Assurance Society of Virginia 'to pay to the assured, Seymour P. Vial, or his heirs, executors, administrators, or assigns, all such losses or damages as shall happen by fire or lightning (in a given period) to the above-mentioned buildings according to the true intent and meaning of the said acts of the Legislature of Virginia, and the constitution, rules, and regulations of the said society aforesaid.' It will be observed that the covenant is to indemnify the insured against all such losses or damages as shall happen by fire or lightning to the buildings mentioned, according to the true intent and meaning of the acts of the Legislature, and the constitution, rules and regulations of the society. By an act of the General Assembly, passed 22d of December, 1794, authorizing the formation and incorporation of said company, the inducements to the formation of the Mutual Assurance Society against fire on buildings of the State of Virginia are set out in section 7 as follows: 'From the great and frequent losses sustained by the ravages of fire, it is advised expedient to adopt some mode to alleviate the calamities of the unfortunate who may suffer by that destructive element.' And, by section 2, the principles

on which the society is to be formed are declared to be 'that the citizens of this State may insure their buildings against the losses and damages occasioned accidentally by fire, and that the insured pay the losses and expenses, each his share, according to the sum insured.' This is no new principle in insurance societies. Is it not the case in all insurance companies that the insured pay the losses? If they are paid at all, they do. And for that purpose premiums are paid and quotas collected. Subsequent sections provide for raising a fund and investing it, so that the ordinary losses may be met by the interest on it.

"As soon as the sum of three millions is subscribed this section also provides that the society is to be organized. And, by section 3, it is incorporated under the name aforesaid, with the rights of succession, of sueing and being sued, pleading and being impleaded, &c., in its corporate name.

"By article X, section 11, of the constitution, rules and regulations of the society, it is provided as follows:

"Buildings insured by this society are only insured against such losses or damages as may be occasioned by accidental fire, or by lightning."

"It is contended by the defendant company that the before recited provision in the Act of Assembly, and this 11th section of the C. R. & R., are a restriction upon the general terms in the policy as to losses or damages which shall happen by fire, and limits it to such fires as are accidental. That would seem to be a fair construction. But it is important to ascertain what is meant by accidental fires. Surely the Act of Assembly was not designed to restrain the society within such narrow limits, that it could not afford relief or alleviation to the calamities of the unfortunate who may suffer by the hand of the incendiary. The language in section 2, that the citizens of this State may insure their buildings against losses occasioned accidentally by fire, I think must be construed accidental as to the insured; that it did not occur by his will or design; that it was accidental as to him; that he had no willful agency in it. If the fire was caused by an incendiary, or by any other means, which was without design or without agency on his part, it would be as calamitous to him, and his claims

for alleviation would be as influential and as meritorious as if the fire had been the result of the merest accident.

"Section 5 of the act, I think, shows what is meant by the expression in section 2, 'occasioned accidentally by fire.' It provides that 'they (the company) shall agree upon certain premiums to be paid by the persons who shall have their property insured at the time of such insurance, which shall be deposited and kept as a fund for the purpose of making immediate reparation to such persons as may sustain losses or damages by fire, after proof that the fire actually happened.' The reparation to be made is for losses by fire. It doesn't say by accidental fire, or accidentally by fire. But the succeeding clause explains it. It adds, 'unless it be proved that the proprietor of the buildings insured did willfully occasion the fire, directly or indirectly.' It means accidental as to the proprietors, but not as to others, and shows that he is to be paid for the loss unless the fire was wilfully caused by him. That is the only exception."

"This is the construction placed on it, I think, by the company itself, as is shown by the latter clause of section 4, article XIII, p. 24 of the C. R. & R., of the society, in which this language is used:

"If the person entitled to the benefit of insurance shall not believe that the burning was entirely accidental as to others, he shall, notwithstanding, make oath or affirmation that he was not himself, either directly or indirectly, the cause thereof; and in his affidavit shall state what he knows or believes with respect to the intentional burning by others."

"And such affidavit meets the requirements of the company.

"In the case under judgment, the fire was entirely accidental as to the proprietor of the buildings. He certainly had no agency, directly or indirectly, in causing it."

It may be added to the foregoing argument that it can be fairly said that it was the intention of the Legislature of the Commonwealth of Virginia to protect the citizens from

losses resulting from fires, caused by the invasion of a *foreign enemy*. The declared purpose of establishing the Insurance Society was to enable her people to "insure their buildings against the losses and damages *occasioned accidentally by fire*." (See original charter of 1794.) When the society was organized the "invasion of foreign enemies" must have been fresh in the minds of the people who enacted these statutes, and if they had intended that such risks should not be insured against, they would have so stated it, in plain language. In October, 1781, only thirteen years prior to date of this original charter, an invading army was in possession of Yorktown, a village and seaport in the State, within a day's march of the city of Richmond, where the Legislature of Virginia afterwards sat to devise a plan "to alleviate the calamities of the unfortunate, who might suffer" from "the ravages of fire." Could they have forgotten the invasions of the common enemy in 1781 and 1782? Is it not more consonant with all the circumstances that the insurance was intended by the legislative mind to cover fires resulting from such invasions than that such losses were to be excluded from the risks? This will seem much more probable when we remember that the society was a *mutual* and not a stock company. It seems to us that the reasoning of Mr. Justice Anderson on the subject are much nearer the true theory than the view adopted by the court below.

These views seem to us also to settle beyond successful controversy, that the society never intended to exempt itself from liability for losses occasioned by the accidents which might happen in consequence of any rebellion. It will be remembered as a part of the history of those rebellious times, that there was a blind and abiding confidence in the minds of the people in that latitude in the abilities of the armies of the Confederate States to successfully resist all attacks upon Richmond by the national forces, and it is not at all probable that the managers of insurance companies in

that city, would have regarded their ordinary fire risks as being rendered more hazardous by reason of the threatened attacks of the army which they denominated "the enemy."

At all events the burthen rests upon the society "to satisfy this court that it was consonant with the apparent object and plain intent of the parties" in 1858, to exclude from the risk assumed by the society, its liability to pay for losses occasioned by fires resulting from the acts of their own people under the circumstances attending the origin of the fire in question. The burthen is not upon the assured. "Ambiguities should be construed most strongly against the underwriters, and most favorably to the assured." (*Ins. Co.* vs. *Boon*, 95 U. S., 128.) The doctrine is well settled that the insurance company asserting an exception to a general or comprehensive risk, must clearly point it out in the language of the contract, otherwise its liability will be enforced.

2. But even if these two sections of the rules and regulations do constitute a part of the contract, we contend that the Society is liable; this brings us to the question growing out of the language of the twelfth section of the rules above copied.

On this subject, we again invite the attention of the court to the reasoning of Mr. Justice Anderson in the court below. He says:

> "But the defendant company contends that it is exempted from liability for loss or damage by section 12 of said article X. That section reads as follows:
>
> "'No policy whatever which may be issued shall bind the society to answer for losses which may result from riots, civil commotions, or insurrections, from the invasion of a foreign enemy, from hurricanes or earthquakes, or from the direct or indirect agency of the proprietor of the building which may be burnt.'
>
> "I am of the opinion that this section, if it is not in conflict with the object and purposes of founding the association and the provisions of the charter, is a limita-

tion and a restriction upon the general undertaking of the company, on the face of the policy, to be liable for all such losses as shall happen by fire to the said build ings of Seymour P. Vial; and that it is liable to the plaintiff for all losses and damages to the said buildings by fire which did not result from one or the other of the above enumerated causes. The buildings were destroyed by fire. Was it the result of either of the above named causes?

"It seems to me that the contract should be construed according to the established rules and canons for construing contracts in general, and that there is nothing in the relations which existed between the plaintiff's testator and the corporation with whom he contracted, which entitles the latter to the application of more favorable rules in the construction of its contract in this case than those which are applied in construing the contracts of other insurance companies. It has been held, and I think properly, that the rules of construction of contracts with mutual insurance companies are not different from those applied in construing contracts with stock companies. And the Mutual Assurance Society of Virginia is but a mutual insurance company, and I can perceive no good reason for applying different rules of construction to its contracts with its assured, than are applicable to contracts in general, because the insured in entering into the contract becomes a member of the society. His contract is with the corporation as a distinct person from the individual members who compose it; and by becoming a member under its peculiar constitution and organism, he acquires no appreciable influence in directing or controlling its action and management. As between him and the party with whom he contracts there exists the same diversity of interest, touching the contract that exists between parties to contracts in general. And when his insured buildings are destroyed by fire, or by lightning, his interests and those of the corporation, and, indeed of the whole body of the society, become adverse.

"I think this diversity and antagonism of interest is shown by the dealings of the company, in its endeavors to enforce its claims for arrearages in some in-

stances, not only against those who have voluntarily become members, and liable by their own acts of volition, but also against those who had never become members and liable for the arrearages by their own consent, but who had actually no knowledge of the existence of any arrearages, or of the liability of the buildings when they purchased and paid for them; and were constituted members of the society without knowing it, and in fact, in total ignorance, that there was such a society in existence. And in this case, the company in their conduct of its defence, does not seem to have acted differently from what is usual between parties litigant in the most strenuously contested cases, when either party is ready to take any advantage the law or rules of pleading may give him, though not necessary to the attainment of the ends of justice, so that he may defeat his adversary. I allude, of course, to the earnest endeavors of the company to avoid responsibility in this case upon grounds which would defeat a trial on the merits, and upon grounds which we all hold to be untenable.

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"These contracts were made, or were rather a reaffirmation, upon a revaluation of the buildings, of contracts which had been made perhaps seven years or more before—the first, on the 19th of February, 1856; the second, on the 31st of December, 1858; and the third, on the 19th of January, 1859. The paper exhibited by the company with its answer, purporting to be the constitution, rules and regulations of the Society, from which the citations have been made, shows on its title page that they are set out 'as amended and revised subsequent to the 19th of May, 1819, and in force on the 1st of October, 1856." But whether the section under consideration was in force prior to the 1st of October 1856, does not appear so far as I have been able to discover; if it was not, it could not affect this contract of assurance of the 19th of February, 1856, it being prior thereto.

"There was no civil commotion nor insurrection in Richmond when the fire occurred which caused the loss.

> The people of Richmond had been in resistance to the Government of the United States, but under an organized Government of the States, and of the Confederacy of States, which had successfully resisted for four years all the power of the United States Government in arms aided by the outside world, from which they recruited their armies, and replenished their military stores. Richmond was a municipality of the State of Virginia, which was a member of the Confederation of States to whose governments she was subordinate, and rendered rightful obedience; and unless these regularly organized governments, whether rightful or defacto, can, in any propor sense, be so denominated, the loss could not have been the result of civil commotion or insurrection. In no sense of the terms was there any civil commotion or insurrection in Richmond when the fire occurred. There was in fact no resistance in the city to the government of the United States. For it appears that before the warehouses were fired, which was the beginning of the fire, the municipality had sent deputies to the commander of the United States forces, offering to capitulate, and the capitulation, as well as we can learn from the record, was most probably accepted before the torch was applied—at any rate there was no resistance of any sort to the Government of the United States, or its army, from the municipality of Richmond, or its people, when the warehouses were fired. Consequently the fire could not have been the result of civil commotion or insurrection in the city of Richmond.

A rebellion of the kind which broke out in 1861, in the Southern States, could not have been in the minds of the contracting parties in 1856 and 1858, and they could not then have regarded the armies of the United States as "foreign enemies." At all events, if it be true that the insurance companies, seeking to establish exceptions, must be held to strict proof and a strict construction of the language used by them, it will be necessary for them to show that the national army was, at that time, so regarded by both parties.

We think we are justified in concluding that when these parties made the contracts in question, they did not intend to except any loss caused by fires resulting from the movements of the armies of the United States. If they did, they surely fell far short of saying so. These considerations, when taken in connection with the foregoing remarks, seem to leave but little room for doubt as to the correctness of our position on this branch of the case. But we may add that a civil commotion has been defined to be an irregular violence or a wild commotion; the wild or irregular action of many persons assembled together. (*Spruil* vs. *Ins. Co.*, 2d Jones, N. C., 126; See also *Langdale* vs. *Mason*, 2 Mar. on Ins., 792; *Dupier* vs. *Ins. Co.*, 5 La. Ann., 482.) Webster defines "insurrection" as a rising against civil or political authority; the open and active opposition of a number of persons to the execution of law in a city or State, and adds that an insurrection as distinguished from sedition, revolt or rebellion, is a rising of individuals to prevent the execution of law by force of arms. (See Webster's Dictionary.) The "Imperial Dictionary" gives substantially the same definition, and adds that the term differs from "rebellion" in this, that the latter word "expresses an attempt to overthrow the Government to establish a different one, or to place the country under another jurisdiction."

There was a rebellion existing in various parts of the United States included within the territory controlled in various places by the combination of States which undertook to establish an independent government, but it is in no sense true that there was a "riot," a "civil commotion" or an "insurrection" in the City of Richmond when the fire was started which did such deadly work on the morning of April 3d, 1865. On the contrary it seems that everything was quiet. The rebel army had departed; only a few guards had been left, and the fire department of the city had been notified to be in attendance to prevent the extending of the confla-

gation. Very soon after midnight a deputation of the people of the city, headed by the mayor, had gone out beyond the city limits, about two miles, to meet the United States troops for the purpose of "surrendering" the city. At this point they waited for the approach of the troops, and after they had "surrendered" and had started back and had proceeded about a half mile, and about sunrise, the fire was seen by them. It cannot be successfully contended that the troops of the United States caused any commotion, or that they "invaded," the city and in consequence of such invasion the fire broke out. If these troops had not been invited into the city by the municipal authorities of Richmond it is probable that they would have entered the city if at all, much later. We think, in view of all these considerations, that the provisions touching riots, civil commotions and insurrections, can avail this insurance company nothing in these causes.

The next question to be disposed of is whether or not the fire which caused the damage resulted from "the invasion of a foreign enemy," within the meaning of the language which occurs in the rules and regulations of the insurance society; this is assuming of course, that the 11th and 12th sections of the 10th article of the rules and regulations constitute a part of the contract.

Policies of insurance, says this court, like other contracts, must receive a reasonable interpretation consonant with the apparent object and plain intent of the parties. This is entirely consistent with the rule that ambiguities should be construed most strongly against the underwriters, and most favorably to the assured. It was well said recently by the New York Court of Appeals, that, in construing contracts, words must have the sense in which the parties understood them. And, to understand them as the parties understood them, the nature of the contract, the objects to be attained, and all the

circumstances must be considered. (*Ins. Co.* vs. *Boon*, 95 U. S., 128.) Applying these principles to the present case, and keeping them in sight, we observe that the latest of the policies were issued in 1858, (Dec. 31st), more than two years before the breaking out of the rebellion, and long before anyone seriously thought of the possibility of such a gigantic and bloody controversy between the two sections of the republic.

Our view of the case is very much strengthened by the fact, that soon after the rebellion was over the society, the defendant below, inserted in its policies the words usually found in fire policies, excepting from the risks assumed, damages by fires resulting from "military or usurped power." (Goddin, R. 28.)

There is another and a very strong argument in favor of the foregoing views as to the construction of the agreements, which arises from the circumstances attending the making and the continuing of the contract between the parties. The latest contract was made December 31, 1858, and the premiums upon all of them, says the stipulation, (Grame, R., 6) "had been regularly paid up as they became due prior to the fire." This means that the premiums had been paid up, and that the policies had been continued from year to year, for the years 1859, 1860, 1861, 1862, 1863, 1864 and 1865. Now it is within the recollection of most of us, and it is a part of the history of the country, that the army of the United States was within sight of the spires of Richmond from sometime in May up to about the 26th of June, 1862, and it was daily threatening an assault with cannon and musketry upon the defensive works of that city. In May, 1864, the armies of the United States again began to bear down upon Richmond, and continued to harass and threaten the city, until the time of evacuation in April, 1865, as before stated. If this society did not intend to in

sure its members against losses by fire resulting from such a threatened bombardment, why did it not during these years of almost continuous threats modify the terms of its contract, and exclude such fires from its risk by apt provisions?

It must have had counsel employed who were learned in the law, and they knew, if every business man of ordinary intelligence did not, that under no circumstances, during the integrity of the United States government could its armies be judicially held to be a "foreign enemy," and that such words could not exclude from the risk assumed by the company, losses occasioned by fires resulting indirectly from the movements of the national forces.

The language of this twelfth section declares that the insurance society shall not be bound to answer for losses which may result from "the *invasion of a foreign enemy.*" Now, did the loss in question result from an "invasion" by any force or power, and if it did, was such invasion made by an "enemy?" If these propositions can be answered in the affirmative, then was this "enemy" a "foreign enemy?"

a. Did the troops of the United States invade Richmond at the time of the fire in such a manner as to warrant the conclusion that the loss to the assured resulted therefrom? If, for example, a foreign army should take possession of Fortress Monroe, with the avowed purpose of over-running and conquering Virginia, and the people of Richmond, in apprehension of approaching danger, should destroy the city by fire, this would be no defense to an action on these policies. The loss in such a case would necessarily be attributable to the speculative conclusions or ill-grounded fears of those who started the fire, and not to "invasion." This word, as used in this section of the regulations, undoubtedly contemplates a loss immediately (not remotely) resulting from a hostile attack with force of arms. The word is one which is in common use in the law books and

has been often defined. Bouvier defines "invasion" as "the entry of a country by a public enemy, making war." Webster defines the word as meaning "a warlike or hostile entrance into the possessions or dominion of another;" a "forcible entrance into a foreign country." The Imperial Dictionary favors this: "The entrance of a hostile army into a country for the purpose of conquest or plunder, or the attack of a military force." The Constitution of the United States provides that the privileges of the writ of *habeas corpus* may be suspended in cases of "rebellion or *invasion*," that the militia may be called forth "to suppress insurrections and repel *invasions*;" it also requires that the United States shall protect each State against "invasion" and "domestic violence," thus drawing a marked distinction between these two evils.

We think we have fully and fairly stated the circumstances attending the acts of the persons who were responsible for the fire at its inception in another part of this brief, and we submit that the losses did not result from any act of the troops of the National army. They were miles away and, for aught we know, were quietly sleeping in their tents; they made no attack at the time, upon Richmond, and indeed there was no necessity for their entering the city after the Confederate troops had left it. It may be that, in the absence of this fire, they would not have entered it at all.

It seems to be an indisputable fact too, that if the army did invade Richmond at all, it was actually sent for, for that purpose, by the people of Richmond, and that it entered the city as quietly as our troops ever entered the City of Washington. It is also an undisputaed fact that the buildings were ignited by other persons, who were not connected with the army, and for the purpose of destroying the property of private citizens, which property was in no sense contraband of war. Therefore, in view of all these circumstances we say

that as a matter of fact, the loss did not result from any act of the army of the United States.

b. The Constitution requires that the United States shall guarantee to every State a "republican form of government," and also to protect each of them against "invasion" and against "domestic violence." The President of the United States is vested by that instrument with the whole Executive power of the Nation, and he is bound to take care that the laws be faithfully executed. The statute books at the time of this loss abounded in laws requiring the President to use every power of the government to suppress the rebellion; in the performance of these duties were the armies under him "enemies" within the meaning of this word as employed in these policies, or in any other sense? We submit that they were not.

c. But if it can be said that the army of the United States invaded Richmond and was an enemy, then, the next inquiry is, was it a *foreign* enemy, within the meaning of the terms of these policies? This court declared in relation to the rebellion, whilst it was raging, that "all persons residing within this territory whose property may be used to increase the revenues of the hostile power are, in this contest, liable to be treated as enemies, *though not foreigners.* They have cast off their allegiance and made war on this Government, and are none the less enemies because they are traitors." (Prize Cases, 2 Black, 674.) But these Confederated States, by the act of rebellion, and by levying war against the nation, did not become *foreign States*, nor their inhabitants *alien enemies.* (*Shortridge* vs. *Macon*, Chase's Decisions, 136.)

This court has never held that the Confederated government was a *de facto* government; on the contrary, it has steadily denied to it that character. (*Williams* vs. *Bruffy*, 95 U. S., 184, 185; see, also, *Shortridge* vs. *Macon.*)

It seems that this question, whether or not the threatened approach and attack upon Richmond, by the armies of the United States, was an invasion by a foreign enemy, was seriously raised and debated in the courts of Virginia as if it had been a new and open question, and that it was seriously listened to and decided. After nearly a score of years has elapsed since the end of the rebellion, it should seem that such a question ought not to be discussed again. The question was decided by the war itself; and to say now, that in making that decision the armies were *foreign invaders*, seems to be inconsistent with the becoming gravity appertaining to a serious discussion in a court of justice. To assert that the national troops were a foreign enemy is to deny the supremacy of the Constitution and laws of the United States, and to assert the success of the rebellion.

It has been asserted that the decision of this court in the case of *The Ins. Co.* vs. *Boon*, supports the position assumed in behalf of the insurance society in these cases. In that case Col. Harding, commanding a portion of the army of the United States and in occupation of the city of Glasgow, Mo., was attacked by an organized military force of persons in rebellion against the United States. In order to prevent the military supplies belonging to the Government, (stored in a building in that city at the time) from falling into the hands of the rebel forces beseiging him, he set fire to the building; from this building the flames were communicated to the building covered by the policy in suit in that case, and the latter building was consumed. It was held that Col. H. was justified in setting fire to the building for the purpose actuating him, and that, therefore, the company was not liable because the policy exempted it from liability for losses caused by "any invasion." Here, it is asserted, although the situation of the rebel and national forces is reversed, that the same rule applies. But the distinction must be manifest. There, the officer causing the fire was in the

discharge of a clear duty and was acting in the interest of his government. He was resisting a violent and what proved to be a successful military assault upon the city which he was ordered to defend; the assailing party was an unlawful military organization in active rebellion against the authority of the United States. In the present case there was no bombardment, no attack whatsoever; the troops of the United States were miles distant from the City of Richmond, and the persons who ignited the buildings did so for the purpose of preventing the possibility of the use by the United States, of the property they sought to destroy; the forces of the Confederate States had left the city and profound quiet, except for the fire, prevailed. In order too, to give this argument any force it must be *assumed* that the army of the United States was a "foreign enemy."

III.

We also submit to the court that the proximate cause of the fire from which the damage resulted was the high wind which set in soon after the warehouses were ignited. This high wind was wholly disconnected from the act of setting fire to the buildings, and was self operating. (See *M. & L. R. W. Co.* vs. *Kellogg*, 94 U. S., 469; *Ins. Co.* vs. *Boon*, 95 U. S., 133.) It cannot well be argued that this property would have been injured in the absence of the high wind. The fire was blown for a long distance and across a wide street, by the power of the wind. The wind, in this case, was a "new and *independent* cause of loss." When the fire was applied to these warehouses there was no wind, the air was unusually quiet; there was no reason to expect the violent wind which arose soon after the buildings were set on fire. Every care and precaution was taken to prevent the spreading of the flames, and had it not been for the intervention of

this unexpected, accidental and wholly new and uncontrollable power, the fire would undoubtedly have been confined to the two warehouses.

We submit that the judgment of the court below, in the Grame case and the decree in the Goddin case, should be reversed with directions to enter a judgment and decree in favor of the plaintiffs in error and appellant for the amount due them respectively, according to the terms of the policies together with interest and costs.

WM. B. WEBB,
ENOCH TOTTEN,
For the Plaintiff in Error, and for the Appellant.

112-213

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In the Supreme Court of the United States.

OCTOBER TERM, 1884.

GRÆME'S EX'OR, *Plaintiff in Error.*
vs.
THE MUTUAL ASSURANCE SOCIETY OF VIRGINIA. } No. 95.

VIAL'S EX'OR, *Plaintiff in Error.*
vs.
THE SAME. } No. 96.

Brief for the Defendant in Error.

GEO. F. EDMUNDS,
WM. A. MAURY,
WM. W. CRUMP,
W. HALLETT PHILLIPS.
for Defendant in Error.

R. O. POLKINHORN & SON, PRINTERS,

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THE SAME.	

Brief for the Defendant in Error.

These two cases, arising out of the same predicament of facts, are one case, substantially, and were argued and decided as one case in the State Court, and, it is presumed, will be dealt with in the same way in this Court.

It is submitted in behalf of the Insurance Company that (1) no Federal question was decided by the State Court; (2) that if any such question was decided, it is not such an one as is cognizable at the suit of these plaintiffs in error; and (3) that if a Federal question was decided, and is cognizable at the suit of the plaintiffs in error, the judgment in the one case and the decree in the other must be affirmed irrespective of the Federal question, for that the State Court decided at least one question in each case which was, at the same time, non-Federal and decisive of it.

It is difficult to understand how a Federal question can be said to exist in either case, even colourably.

The ground of suit in each case is a formal contract of insurance against loss by accidental fire and lightning.

The plaintiffs allege that the property insured has been destroyed by accidental fire, within the terms of the policies, and it is by force of the policies alone that they seek to recover.

The Insurance Company defends on several grounds, which are particularly stated in its answer in No. 96, the suit in equity (R., pp. 4–16), and are as follows:—

(1.) That the respective demands are not warranted by the contract; in other words, that the fire which produced the losses was not "accidental," and, whether accidental or not, that it falls within the provision of the policy exempting the company from liability for losses "which may result from riots, civil commotions or insurrections, from the invasion of a foreign enemy, &c," as having been occasioned by one or more of the agencies mentioned; the undisputed fact being that the property insured perished in the great fire which occurred at Richmond, in 1865, when that city was captured by the Federal forces;

(2.) That the company was discharged by the failure of the assured to give notice of his demands, as required by the policy;

(3.) That the assured was estopped to make the demand sued on by his conduct in accepting, by way of part payment of his premiums on the insurance on the new building erected in the room of the one burnt down, credits to the extent of certain premiums that had been paid on the old insurance.

The same defences were made in No. 95, the action at law, although not specially presented in the pleadings, as appears by the bill of exceptions, which sets forth evidence

relevant to the three issues made in the suit in equity. (R., pp. 4–16.)

By reference to the opinion of the chancellor in the suit in equity, No. 96, (R., pp. 55–59), it plainly appears that he decided the case solely on the terms of the contract of insurance. He says:

> "*The question is, whether this loss occurred by means of a risk excepted in the policy;* or, to state it more definitely and more exactly with the contention of the defendant, as set forth in its answer, *whether the society was exempt from liability by reason of the express terms of the contract, and, especially, by reason of the exception against fire which may result from foreign invasion, civil commotion, or insurrection.*"

He then proceeds to consider these three heads of exception, holding that the fire was clearly within that exemption clause.

Upon reference to the opinion of the court in No. 95, the action at law, (R., pp. 16–21,) we find that the only question considered was that of estoppel, and on that issue judgment in chief was given for the defendant.

Turning now to the opinion of Judge Christian delivered in the Court of Appeals, in both cases, and given in the record in No. 96, (pp. 91–99), which opinion, it will be seen on reference to the decree in No. 96, (p. 87), and the judgment in No. 95, (p. 22), was adopted by the majority of the court, turning now to this opinion of the Courts of Appeals, it appears that the learned judge, its organ, after disposing summarily of the questions of notice and estoppel, as not being at all founded, proceeds to say:

> "Having disposed of these preliminary questions. I come now to consider *the main and important question, whether the Mutual Assurance Society is exempted from liability by the provision incorporated, in accordance with the rules and regulations of the Society, in all the policies which it issued,* made in pursuance of the statute law,

(which statute law is the source and charter and foundation of all its power and authority), the provisions of which are in the following words:

'SEC. 11. Buildings insured by this Society are only insured against such losses or damages as may be occasioned by accidental fire or by lightening.'

'SEC. 12. No policy whatever which may be issued shall bind the Society to answer for losses which may result from riots, civil commotions, or insurrections, from the invasion of a foreign enemy, from hurricanes or earthquakes, or from the direct or indirect agency of the proprietor of the building which may be burnt.'" (R., p. 92).

* * * * * *

"Now these two sections of the statute, *which are embraced in every policy issued by this Society, contain the contract of the party dealing with it*, and UPON THESE ALONE THE LIABILITY OF THE ASSURANCE SOCIETY MUST REST. (R., p. 92.)

"The terms of *this contract* fixing the liability of the Assurance Society are, to my mind, *plain, simple, unequivocal and certain*. The company has declared, in unmistakable terms, to be responsible only for losses or damage 'occasioned by accidental fire or by lightning.' It has declared in equally plain and unequivocal terms that it will not be responsible for loss or damage which may result from riot, civil commotions, or insurrections, or from hurricanes, earthquakes, or from the direct or indirect agency of the proprietor of the building which may be burnt."

Having thus laid down what is the contract between the company and the assured, the judge proceeds at once to consider the evidence, from which he deduces the following conclusions of law:—

That the company is not liable because the fire was not "accidental," but the result of design and set purpose, and to show this the judge says:

"From the evidence quoted and the [Confederate]

> act of Congress above referred to ['an act to regulate the destruction of property under military necessity, and to provide for the indemnity thereof'], it is plain that this fire, from which the appellants' buildings were burned, *resulted from the act of these military officers, acting* UNDER EXPRESS ORDERS *and by virtue* of an act of Congress of the Confederate States of America." (p. 96.)

Having thus established from the evidence that those who applied the torch which started the fire were acting under "EXPRESS ORDERS," the judge goes on to say "*certainly it cannot be said that the fire which consumed the buildings of the appellants was an accidental fire*" (p. 96); and this he advances as a perfectly obvious result of the evidence that the fire proceeded from direct design *and not accident.*

Again, he says:

> "No man can say, reading the facts of the case, that that fire which consumed the heart of the city was an accidental fire, but must conclude that it was a fire which originated and was caused by and resulted from the acts of military power which the Assurance Society had nothing to do with and over which they had no control." (p. 96.)

Again, he says:

> "Is it possible that, with the careful and guarded language by which this Society expressed its contract, *using every term that it was possible to use to* express its unwillingness to insure *against any loss by fire except what was merely accidental, that it can now be held that a fire originating from the agents and officers of a military power, over which the Society had no control will bind the Society* AGAINST THE EXPRESS STIPULATION OF THEIR CONTRACT. NOW, I REPEAT, WHAT IS THAT CONTRACT?"

He then restates the contract and says:

> "*Now, the burning in this case was not accidental,* but the evidence shows that it was in consequence of the invasion of the city by the Federal army."

Leaving now the question of accident, the judge says: "Unquestionably the Company intended to protect itself against ALL LOSSES EXCEPT BY ACCIDENTAL FIRES, and in their contract of insurance, they used terms that would seem to embrace every conceivable condition of affairs except accidental fire. I suppose that 'civil commotion' must necessarily arise where there is civil war. It is true there may be civil commotion without civil war, but certainly there cannot be civil war without civil commotion, and I think that no man who lived in the last decade would say that there was no civil commotion between 1861 and 1865," thus deciding that the state of things out of which the fire originated amounted to "civil commotion" within the meaning of one of the exemption clauses of the contract.

The judge then proceeds to notice another ground on which the Company is protected from liability, saying:

> "But the company not only protected itself against liability for loss occasioned by such insurrections and civil commotions, but against the 'invasion of a foreign enemy.'"
>
> "In the light of history and of facts familiar to every man who opens his eyes and sees material facts before him, is it not plain that the late war was a war of invasion, and that it was the invasion of a foreign enemy?" (p. 97.)

Surveying the whole case, the judge says:

> "I am therefore of opinion that THE STIPULATION IN THE POLICY PROTECTS THE COMPANY, *and that it is not responsible for any loss or damage occuring from such a fire.*" (p. 98.)

As if to make more emphatic, still, the ground on which the opinion turned, he says:

> "In my opinion it is plain that the Society is not bound and has PROTECTED ITSELF BY THE VERY TERMS OF THE CONTRACT *which it made with all its policy holders in plain and unequivocal language*, by which it af-

> firmatively declared that it would only insure against accidental fire, and negatively declared that it would not insure against loss or damage which might result from riots, insurrections, civil commotion, the invasion of a foreign enemy, hurricanes, earthquakes, &c." (p. 98.)

In his dissenting opinion, Judge Anderson, combatting the opinion of the court, discusses what constitutes an "accidental fire," in the sense of the policy (p. 101), and, then, whether the losses in question fall within the exceptions of the policy touching "riots, civil commotions, or insurrections, from the invasion of a foreign enemy" (pp. 102–107), and, finally concludes that the exceptions just referred to are void on the ground of repugnancy to the charter. (pp. 107–109.)

It is thus perfectly manifest that the case was decided in favor of the company on reasoning that turned exclusively on the terms of the contract of insurance; in other words, the court say, that the company is not liable because the loss was not the result of an accidental fire, and because the loss fell under several of the exceptions stated in section 12 of the company's rules and regulations which, as we have seen, form a part of every policy of insurance issued by it.

It being thus demonstrated, as we think, that every point decided against the assured arose under the policies in suit, it may be repeated, with some confidence, that there is nothing in either record which amounts to so much as the *colour* of a Federal question

Looking, now, at the several categories of this Court's jurisdiction to re-examine the judgments and decrees of State Courts, as provided in section 709, Rev. Stat, we fail to discover in either record that a treaty or statute of, or an authority exercised under, the United States is drawn in question; or that there is involved the validity of a statute of, or an authority exercised under any, State, or that "any title, right, privilege or immunity is claimed under the Con-

stitution, or any treaty or statute of, or commission held, or authority exercised under, the United States."

As there is no handle whatever to maintain that either case involves a question as to the validity of any statute, State or Federal, if a Federal question exists it must be some "title, right, privilege or immunity" set up by the assured or the Company.

But it seems not to admit of argument that the assured have not set up any claim that did not spring from the contracts directly.

It follows, then, that, if any Federal "title, right, privilege or immunity" was set up, it was by the Company. In that case, however, a writ of error does not lie at the suit of the assured, because it is only the party whose "title, right, privilege or immunity," is *denied* that can sue out the writ, and as such "title, right, privilege or immunity" set up by the Company, was necessarily conceded and respected, or certainly not denied by the State Court, 'tis not possible that the assured can challenge the decision of the State Court in that particular.

Congress, in the exercise of its power to regulate the appellate jurisdiction of this court has seen fit to deny to it the power to issue the writ of error to a State Court at the suit of any party to a cause in which a "title, right, privilege or immunity" of a Federal complexion was set up, except the one to whom it was *denied*, and to refuse the writ, *absolutely*, in all cases of that character where the Federal contention is upheld by the State Court, such decision being final and conclusive.

But, supposing there is a Federal question in these records, so presented, as to give this court jurisdiction, we submit that, on a ground well established, the judgment in the one case and the decree in the other must be affirmed, albeit the court should be of the opinion that the Federal ques-

tion was erroneously determined by the State Court; for it is a settled doctrine that if the record disclose a plurality of contentions, some Federal in character and others not, the decision of any one of which must be decisive of the case, and the State Court gives judgment on all of them, this Court will, on writ of error, affirm the judgment, without considering the Federal question at all.

In *Jenkins* vs. *Lœwenthall* (110 U. S., p. 222), which was an action by the assignee of a bankrupt to recover certain lands, the defences were that the defendants were purchasers, *bona fide*, for value, and that the suit was not brought within two years, under Section 5057 Rev. Stat. The Chief Justice, delivering the opinion of the Court, says:—

> "Either of these defences, if sustained, bars the action. The second involves a Federal question, the other does not. The court, in its decree, sustained them both, and, among other things, found as a fact that the defendants were innocent purchasers for value. As this finding is broad enough to maintain the decree, even though the Federal question involved in the other defence was decided wrong, we affirm the decree, without considering the question or expressing any opinion upon it. *Murdock* vs. *City of Memphis*, 20 Wall., 590, sustains this practice."

Now, it is submitted, that the cases at bar come precisely within this doctrine, for if the Court decided in favor of the company on Federal grounds, as is contended, it is clear that its decision also proceeded on grounds non-Federal and entirely based on the polices, in holding that the fire which caused the losses was not accidental, and that it resulted from "civil commotion," and so that no right had accrued under the policies. Undoubtedly this determination, that the losses were not within the contracts, was conclusive, and broad enough, of itself, to sustain the decision in favor of the company, thus necessitating an affirmance irrespective of the alleged Federal questions.

Now let us see on what grounds it is contended that this court has jurisdiction. But before doing so it is proper to notice a somewhat strangely suggested doubt in the brief for the plaintiff in error (p. 7), as to whether or not the question of jurisdiction was disposed of on the motions to dismiss or affirm made at October Term 1881. To lay this doubt we take from the minutes of the Court the order entered with reference to the motions. It is in these words: "On consideration of the motions to dismiss or affirm, and for writs of *certiorari* in these cases, it is ordered that the motions to affirm and for writs of *certiorari* be, and the same are hereby, denied, and that the motion to dismiss be, and the same is hereby, postponed for hearing with the causes on the merits."

It is attempted to bring these cases within the principle decided in *Williams* vs. *Bruffy*, (96 U. S., 176), where, it will be remembered, it was held that the Courts of Virginia, in enforcing a Confederate statute, had made it a statute of the State within the meaning of the law regulating the jurisdiction of this court (Brief, p. 8).

It is argued that, because the State Court decided that the fire was the result of the execution of certain military orders issued under an Act of the Confederate Congress directing the destruction of property, when necessary to prevent its falling into the hands of "the enemy," it is argued, we repeat, that the validity of this act, which, it is said, is to be regarded as a law of Virginia for the purposes of these cases, is drawn in question.

After the repeated and emphatic declarations in the opinion of the State Court, that each of these cases must be determined by the contract, and the contract alone, it is difficult to understand how the validity of this act could be involved, possibly. The court say that the plaintiff is not entitled to recover, because the loss on which he founds his claim does not come within the terms of the policy—is not

a *casus fœderis*. Whatever reference, then, is made by the court to the Confederate Act, must have been, necessarily, for the purpose of supporting the argument that the plaintiffs' case did not fall within the contract, and for no other.

If, indeed, the court had said that the company was discharged because the fire was the result of enforcing the act, and stopped, it would have been inconsequential, not to say absurd, because whatever might have been the cause of the fire, the company would have been bound to repair the loss it entailed, unless it was excepted from the stipulation to insure against fire, the question being not whether those who burnt down the plaintiffs' houses were authorized to do it, but whether the burning was such a burning as the company had agreed to insure against.

The quotations we have made from the opinion of the court, show plainly, that reference was made to the Confederate Act for the purpose of establishing that the fire was not accidental, but the act of "military officers, acting under express orders, and by virtue of an act of Congress of the Confederate States of America," (Goddin, Rec., p. 96). If, indeed, there can be any need of going outside the opinion of the court to settle such a question, the dissenting opinion of Judge Anderson will be found to support our view.

It is admitted (Brief, p. 12) that the court held "*that the contract did not cover the loss*," but it is said that if the fire "had been the result of an *ordinary* incendiary *the policy would undoubtedly have been held to include the loss. Hence, the 'act' of the Confederate Congress as construed by the court below impaired the obligation of these contracts.*"

From which it is to be inferred that the contract was overborne by the statute, as construed by the court, and, in some mysterious way, by force of the statute made to have a perverted meaning, so that a fire, which, if it had been caused by an "*ordinary incendiary*," would have been within

the policy, was held, under the sinister operation of the act, to be outside the policy.

We deny that there is a syllable in the court's opinion to show that the Confederate Act was treated as having the slightest operation upon the meaning of the contract, or that the court has placed any interpretation upon the contract in these cases which it would not have placed on it if the fire had been caused by an "ordinary incendiary."

The ruling of the court that the fire was not accidental was not in the least degree influenced by the circumstances in which the fire took place. This appears clearly in the opinion of the court, and, also, in the elaborate dissenting opinion, which combats the views of the court on this point with broad and general reasoning, *omitting entirely any reference to the narrow view of the question attributed to the court*—a silence which is hardly explicable if any such view had found its way into the opinion of the court.

It is contended that the plaintiff set up an authority exercised under the United States in this that "it was *asserted* and *maintained* that the officers and soldiers of the army of the United States were warranted by law, and possessed the authority, not only to 'approach' the City of Richmond at the date in question, but that they had a right to march into and through it at their pleasure," and that the converse of this was decided.

To dispose of this point it seems only necessary to recall to the mind of the Court that these cases turn entirely on the policies of insurance, and that it is quite impossible that any such authority could have been set up in them as any part of the case of these plaintiffs, seeking to recover on the policies, and on them only. Whether the armies of the United States had the right to march to or through Richmond or any other place, was a question, the solution of which could not have conduced in any way to the correct interpretation of the contracts sued on.

It is next contended that the decision of the court that the company was not liable because the loss was the result of "the invasion of a foreign enemy," amounted to a justification of the rebel authorities in the destruction of the insured premises, and denied the "immunity" claimed by the assured against pretended statutory legislation directing the armies of these Confederate States to destroy the property of the people, and particularly the assured.

One of the grounds of exemption in the policy insisted on, being loss by fire resulting from "*the invasion of* a foreign enemy," it was manifestly the duty of the State Court to determine the meaning of the exemption, and having done so, this Court has no power to revise its decision. If the State Court had said that a solitary Federal soldier entering the city of Richmond, constituted a foreign invasion, its decision, however absurd, would have been beyond the revisory jurisdiction of this Court.

If we may be permitted to say so, the fallacy in the reasoning on the other side is in failing to appreciate that everything in the opinion of the court, which they rely on as showing the existence of federal questions, was said in direct connection with the interpretation of the contract. The whole business of the opinion, as it repeatedly says, was to expound the contract, and we are bound to take everything in it as laid down exclusively with a view to that end. Read in this light, not even the acumen of the counsel opposite, could detect the semblance of a Federal question in either record.

Supposing, however, the court did decide a federal question and decided wrong in laying down that the march of the Federal army was a *foreign invasion*, we maintain that there must still be an affirmance, for that the State Court should have decided on the same identical state of facts that there was an "*insurrection*," and for that this Court will not reverse a judgment or decree which is fundamentally right, merely because the court that rendered it misnamed the

facts on which its judgment was founded, calling them a foreign invasion when it ought to have designated them an insurrection, on which ground alone, the decision of the court below can be sustained under the contracts.

Again, it is not contended that the court below was in error in determining that the state of things in which the fire took place was a "*civil commotion*," and yet on this single ground the decision should be sustained.

As to the contention that the section of the rules and regulations of the society, exempting the company from liability for losses resulting from riots, civil commotions, &c., &c., "is no part of the contract," we submit no argument in reply, *it being enough for this occasion that the State Court has decided that this section is a part of the contract*, to say nothing of the important and decisive consideration *that these assured have solemnly stipulated that this section of the rules and regulations shall form part of the policies.*

As to the other questions discussed in the briefs filed for the plaintiffs in error, they are entirely non-federal, and are not before the Court on these writs of error, and, therefore, require no notice from us.

It is noticeable, and might be misleading, that in stating the defences made by the Company, counsel opposite omit to make any direct reference to the defence that the fire was not accidental.

The result of the argument in behalf of the defendant in error is:

I. That there is no jurisdiction in this Court to re-examine the judgment and decree.

II. That if there is jurisdiction the judgment and decree were rendered on several controlling points besides the Federal one.

III. That if pronounced on the Federal point alone they were right.

IV. That if the opinion of the court below on the invasion point was erroneous, this Court must give judgment according to the right of the matter, on the true Federal ground that appeared, namely, that of *insurrection*, and not reverse a judgment that is legally right, because the reason for it stated by the court below was not the best one.

Respectfully submitted,

GEO. F. EDMUNDS,
WM. A. MAURY,
WM. W. CRUMP,
W. HALLETT PHILLIPS,
for Defendant in Error.

APPENDIX.

AN ACT

For establishing a Mutual Assurance Society against Fire on Buildings in this State.

[Passed the 22d of December, 1794.]

Sec. 1. WHEREAS, from the great and frequent losses sustained by the ravages of fire, it is advised expedient to adopt some mode to alleviate the calamities of the unfortunate, who may suffer by that destructive element; and William F. Ast, of the city of Richmond, having suggested and submitted to the consideration of the General Assembly, a plan of Mutual Assurance, the title whereof is, "the Mutual Assurance Society on Buildings against Fire of the State of Virginia," which, it is conceived, will fully answer the above purposes:

Sec. 2. *Be it therefore enacted*, That an Assurance be established to be called and known by the name of "The Mutual Assurance Society against Fire on Buildings of the State of Virginia;" the principles whereof shall be **"That the citizens of this State may insure their buildings against the losses and damages occasioned accidentally by fire,** and that the insured pay the losses and expenses, each his share according to the sum insured."

* * * * * * *

As soon as the sum subscribed for shall amount to three millions of dollars or upwards, notice shall be given in the Virginia Gazettes, and a day fixed upon for the meeting of the subscribers, who shall then either attend in person, or by representatives, in the city of Richmond, to examine the aforesaid system of a Mutual Assurance, proposed by the said William Frederick Ast, *and conclude upon such rules and regulations as they, or a majority of them may think*

best; which shall be signed by any twelve of *them, chosen for that purpose, and that the same shall then be binding on all those who shall insure their property in the said Assurance Society.*

Sec. 3. And as soon as they have agreed upon such rules and regulations, they shall proceed to elect, by a majority of the votes of the subscribers present, agents for the management of the business of the said Society; and thenceforth they shall be considered as a body politic, incorporated by this act, under the denomination aforesaid, and by that name shall have succession, and may sue and be sued, plead and be impleaded, answer and be answered, defend and be defended, in any court of law or equity in this Commonwealth, or elsewhere; and may buy and sell, do and execute every other thing relative to the Society. But none of the subscribers or their agents shall be sued individually for anything that relates to the Assurance Society in general. In case of law-suits or any other business, application shall be made to the agents, and they shall appear and act for and in behalf of the Society.

Sec. 4. The Society, or a majority of them, shall be at liberty, from time to time, *to alter and amend the rules and regulations, as they may judge necessary.*"

Rules and Regulations of the Society.—Extract.

Sec. 11. Buildings insured by this Society, are only insured against such losses or damages as may be occasioned by accidental fire or by lightning.

Sec. 12. No policy whatever which may be issued, shall bind the Society to answer for losses which may result from riots, civil commotions, or insurrections, from the invasion of a foreign enemy, from hurricanes or earthquakes, or from the direct or indirect agency of the proprietor of the building which may be burnt.

Copy of Policy.

No. 17940.

This policy of assurance (for the revaluation of the building declared for per former declara ion, No. 15601) witnesseth:

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Copy of Policy.

No. 17940.

This policy of assurance (for the revaluation of the building declared for per former declara ion, No. 15601) witnesseth:

That Seymour P. Vial, residing at Richmond, in the county of Henrico, has entered for assurance against loss or damage by fire, in the Mutual Assurance Society Against Fire on Buildings, of the State of Virginia, per his declaration No. 17940, filed and recorded in the general office, the following buildings occupied by Chas. D. Yale, situated on the northeast of Main street, between the property of A. A. Kirschmann on the southeast, and that of James B. Royster and wife on the northeast, in the said town of Richmond and in the county of Henrico, to wit:

Building used as—	Marked—	The walls built of	The roof covered with—	Valued at—	Nett amount insured.		Premium.	
				Dolls.	*Dolls.*	*Cts.*	*Dolls.*	*Cts.*
Tin & stove store & dwelling	A	Brick	Slate	6,000	4,800	00	72	00
Addition and water-closets	B	do	do	3,000	2,400	00	36	00
Tin manufactory	C	do	do	2,500	2,000	00	40	00
					$8,200	00	148	00

Which sum of nine thousand two hundred dollars is the real sum insured, and on which there has been paid eighty dollars premium, and now this day sixty-eight dollars additional premium, and HE, THE SAID ASSURED, HAVING BY THE ABOVE-MENTIONED DECLARATION, AGREED, FOR HIMSELF AND HIS HEIRS, EXECUTORS, ADMINISTRATORS, AND ASSIGNS, TO ABIDE BY, OBSERVE, AND ADHERE TO THE COMSTITUTION, RULES, AND REGULATIONS OF THIS SOCIETY, WHICH ARE ALREADY OR MAY HEREAFTER BE ESTABLISHED FOR THE SAID ASSURANCE SOCIETY.

Know all men by these presents, that the aforesaid assurance society shall be subject and liable to pay, agreeably to the acts of the legislature of Virginia, and the constitution, rules, and regulations which are already or may hereafter be established for the said assurance society unto the said assured, or to his heirs, executors, administrators, or assigns, all such losses or damages as shall happen by fire or lightning after sunset of this day to the above-mentioned buildings, according to the true intent and meaning of the

said acts of the legislature of Virginia, and the constitution, rules, and regulations of the said society as aforesaid; provided, that the aforesaid buildings are at this instant in existence, and if they, or any part thereof are, or hereafter shall be insured elsewhere, this policy shall be void.

In witness whereof, the principal agent of the said society has signed this present policy with the seal of the office annexed (the same having been countersigned by his chief clerk) at the city of Richmond, this 19th day of February, one thousand eight hundred and fifty-six.

(Signed) J. RUTHERFOORD. [SEAL.]

Countersigned,

(Signed) J. B. DANFORTH, *Chief Clerk.*

112-273

In the Supreme Court of the United States.

GRÆME'S EX'OR v. MUTUAL ASSURANCE SOCIETY OF VIRGINIA, No. 95.

VIAL'S EX'OR v. SAME, No. 96.

SUPPLEMENTAL BRIEF OF JOHN HOWARD,

OF COUNSEL FOR APPELLANTS.

Upon the Question of Jurisdiction.

1. The construction and legal effect of the contract of fire insurance in these cases, ~~involving what~~ presents in itself purely a question of general commercial law, in the decision of which, this court, under the 34th section of the Judiciary Act, is entitled to form and adopt its own opinion irrespective of the State Court to which its writs of error or appeal are directed.

2. The construction and legal effect of such a general commercial contract does not necessarily involve a Federal jurisdictional question under the second section of the act of 1867; nor does a Federal jurisdictional question, under said act of 1867, now the only act in force, necessarily involve a general question of commercial law.

3. But if, in ascertaining the true construction and legal effect of a general commercial contract, a jurisdictional Federal question should, under the circumstances, at the

same time arise, and be decided by the State court adversely to the Federal right, privilege or immunity involved, the jurisdictional question and the construction and legal effect of the commercial contract necessarily constitute integral and inseparable parts of the whole matter, and the decision of the jurisdictional question necessarily involves the decision of the commercial questions out of which, under the circumstances, it arose.

If, for instance, there had been a jurisdictional Federal question in *MacVeigh* v. *Bank*, 26 Grat. 844–845; 29 Grat. 555–556; 98 U. S. 332; involving the commercial liability of an endorser of negotiable paper, undoubtedly the jurisdiction conferred by the Federal question would have carried with it, and necessitated, the jurisdiction to decide the commercial questions arising out of the same facts from which the Federal question originated.

So in the case of *Ins. Co.* v. *Hendren*, 24 Gratt. 536; 92 U. S. 287; involving the commercial liability of the New York Mutual Life Insurance Company upon a contract of insurance upon the life of Hendren, if a jurisdictional question had arisen and been adversely decided by the State court, jurisdiction to review by this court would necessarily have carried with it jurisdiction to decide the commercial questions out of which the jurisdictional question arose.

4. The foregoing propositions seem to be self-evident, and need not be elaborated. It is sufficient to cite illustrations of the principle found in the decisions of this court. In *Woodruff* v. *Trapnall*, 10 How., 190; in *Furman* v. *Nichol*, 8 Wall., 44; in *Keith* v. *Clark*, 97 U. S., 455. The jurisdictional question arose upon the true construction and legal effect of a contract, and as all of the rights, obligations, and immunities of the parties arose out of the contract, the construction of the contract and

the construction of the State legislation impairing its obligations and affecting the rights and immunities of the parties thereto, necessarily involved the same subject matter, and, consequently, the whole matter was disposed of by the adjudication in each case.

5. The cases at bar involve only the same principles. The first and essential question is, Did the construction and legal effect given by the State court to the commercial contract of insurance, under the circumstances appearing in the record, raise a Federal question which was decided adversely to the Federal right, privilege, and immunity involved? And that question depends upon the further general question, whether the obligations and immunities of a contract of insurance by and between citizens of the United States, and based for long years upon the validity and constitution and laws of the United States, which are sought to be changed and reversed by certain ordinances of secession passed by certain States of the Union, and by certain articles of confederation by said States, asserting independence from the United States and the establishment of a new nationality, never acknowledged by the United States, which on the contrary, it expended millions of money and a million of men to destroy, as a rebellion against its authority, and the validity of which ordinances of secession and confederation was assumed by the State court as the basis of its decision, does not present a question involving a right, privilege or immunity of a citizen of the United States, the obligation and rights of whose contracts have been thus dealt with and defeated?

The statement of that question would seem to furnish its sufficient answer.

6. *Ins. Co.* v. *Hendren*, 97 U. S. 276, is cited as adverse to the jurisdiction. But the case is certainly different from these cases. There, it was sought to inter-

ject a Federal jurisdictional question into a case, in which, as the court said: "The pleadings, as well as the instructions asked and refused, present questions of general law alone," and it did not appear that the contract in suit, as determined by the State Court, "had been modified or suspended by the Constitution, laws, treaties, or proclamations of the United States."

It is not perceived what that decision has to do with a case in which it appears that upon the assumed right and power to overthrow and disregard the Constitution, laws, treaties, and executive proclamations of the United States, the State of Virginia and the other Southern States had passed ordinances of secession and withdrawal from the United States, and had formed the league or constitution of a separate Confederacy, in violation of the Constitution of the United States, as repeatedly construed by the decisions of this court, and the Supreme Court of Appeals, of Virginia, had adjudicated the validity of such action, and based its decision upon the hypothesis of an absolute new nationality of the Confederacy, and an absolute denial of the rights, privileges, and immunities of citizens of the United States upon contracts executed before the war, upon the basis of the then and ever continuing nationality of the United States, and the obligations of all of its citizens to observe their duties to the same.

The Hendren case thus broadens into contrast as to the cases at bar.

The case of *Bank* v. *McVeigh* is also cited by opposite counsel. The citation is equally infelicitous, and, indeed, furnishes, in its history, throughout the courts, an apt illustration of the difference between that class of cases in which merely a commercial question arises and a case in which the jurisdictional question arises out of a commercial contract.

In the *Bank* v. *McVeigh*, the greatest effort was made to

obtrude a Federal question into the case, but without avail. On the first hearing in the Court of Appeals, the court distinctly said that its conclusion upon the commercial question involved would be the same, whatever was the legal character of the ordinance of secession, about which it expressly stated that it decided nothing. When the case went back for a new trial in the inferior court, a futile attempt was made to interpolate some dim element of a Federal question by a dozen vague instructions to the jury, remotely suggesting or implying the validity of the State ordinance of secession, but in none in any manner requiring or calling for a direct decision upon that question. The inferior court, of course, accepting the decision of the Court of Appeals as the law of the case refused to consider or pass upon any of the said instructions. On appeal that decision was affirmed.

The case then came to this court, and a motion to dismiss for want of jurisdiction was granted as a matter of course. Although an important and novel question of commercial law was involved, yet it was not so connected with any jurisdictional question as to confer jurisdiction on this court. On the contrary, it is obvious that the Court of Appeals of Virginia, on both occasions upon which the case was before it, was studiously observant to place its judgment upon grounds squarely abroad from any Federal question. And this court accordingly decided that no Federal question had arisen or been decided in the State court, and, therefore, that it had no jurisdiction to review the decision of that court as to its construction of the legal effect of the commercial contract involved, or to pass upon the rights or obligations of the parties thereto.

Here again we say (as in the Hendren case) that it is not possible to discover any connection between that

case and the cases at bar, except in the relations of contrast.

Neither that case, nor the Hendren case, it is submitted, depended in any manner upon the assumed validity of the ordinances of secession, and of the legal constitution of the league or confederation of seceded States, based upon the validity of said ordinances, or upon the legal invalidity of the Constitution, treaties and laws of the United States, within the seceded States.

In the present case, the contrast is presented of a directly opposite condition of things, in which the supervisory jurisdiction of this court is invoked.

Here is a case in which the pleadings, proofs, and the opinion and decision of the State Court, altogether, plainly show that the whole contention of exemption, was based upon the assumed invalidity of the Constitution, laws, and treaties of the United States in the seceded States, and the assumed validity of what this court has frequently and uniformly designated as a mere unlawful, though organized, combination against the constitutional government of the country, and the rights, obligations, privileges, and immunities growing out of the contracts were decided upon that basis, instead of upon the basis of the continued nationality of the United States.

JOHN HOWARD,
Counsel for the Appellants.